COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

VOLUME-I

Washington, D.C.
June 9-10, 2008

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 9-10, 2008

1. Opening Remarks of the Chair

   A. Report on the March 2008 Judicial Conference session.
   B. Transmission of Supreme Court-approved proposed rules amendments to Congress.

2. **ACTION** – Approving Minutes of January 2008 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report.
   B. Administrative Report.

4. Report of the Federal Judicial Center

5. Report of Time-Computation Subcommittee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41; Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033; Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 59, 62, 65, 68, 71.1, 72, 81, Supplemental Rules B, C, and G, and Illustrative Forms 3, 4, and 60; and Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 Cases and 2255 Proceedings.

   B. **ACTION** – Proposal to seek legislative amendment of certain statutory deadlines to account for changes in time-computation rules.

6. Report of the Civil Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Civil Rules 13(f), 15(a), 48(c), and 81(d), and proposed new Civil Rule 62.1.
   B. **ACTION** – Approving publishing for public comment proposed amendments to Civil Rule 56.
      i. Federal Judicial Center report on summary judgment court practices.

ii. Research reports on discretion to deny summary judgment and the use of "deemed admitted" provision.

C. **ACTION** – Approving publishing for public comment proposed amendments to Civil Rule 26.
- Research report on protection of pretrial attorney-expert communications at trial.

D. Minutes and other informational items.

7. Report of the Appellate Rules Committee

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Appellate Rules 4 and proposed new Appellate Rule 12.1.

B. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 1 and 29(a) and Appellate Form 4 (proposed amendments to Rule 29(c) were approved for publication at an earlier meeting).

C. Minutes and other informational items.

8. Report of the Evidence Rules Committee

A. **ACTION** – Approving publishing for public comment proposed "style" amendments to Evidence Rules 101-415 (publication to be deferred until later date).

B. **ACTION** – Approving publishing for public comment proposed amendment to Rule 804(b)(3).

C. Minutes and other informational items.

9. Report of the Criminal Rules Committee

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Criminal Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing § 2254 Cases and § 2255 Proceedings.

B. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 6, 15, and 32.1 (proposed amendments to Rules 5, 12.3, and 21 were approved for publication at an earlier meeting).

C. Minutes and other informational items.

10. Report of the Bankruptcy Rules Committee

    A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 4008, 7052, 9021, and new Bankruptcy Rule 7058.
    B. **ACTION** – Approving without publication and transmitting to the Judicial Conference proposed technical amendments to Bankruptcy Rules 2016, 7052, 9006, 9015, and 9023.
    C. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Official Forms 8, 9F, 10, 23, and Exhibit D to Official Form 1 to take effect on December 1, 2008.
    D. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Official Form 27 to take effect on December 1, 2009.
    E. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 1014, 1015, 1018, 5009, and 9001 (proposed amendments to Rules 1007, 1019, 4004, and 7001 were approved for publication at an earlier meeting).
    F. Minutes and other informational items.

11. Report on Standing Orders

12. Report on Sealed Cases

13. Long-Range Planning Report

14. Next Meeting: January 2009

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS
May 15, 2008

Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 <lee_rosenthal@txs.uscourts.gov> <Sheila_Logullo@TXS.uscourts.gov>	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459 Phone 617-552-8650 Fax 617-496-4867 <Coquille@Law.Harvard.edu>
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074 Phone 318-676-3765 Fax 318-676-3768 <carl_stewart@ca5.uscourts.gov>	Prof. Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104 Phone 215-898-7068 Fax 215-573-2025 <struve@law.upenn.edu>
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007 Phone 212-805-0417 Fax 212-805-0426 <Laura_T_Swain@nysd.uscourts.gov>	Prof. Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772 Phone 937-229-3315 Fax 937-229-2469 <morris@udayton.edu>
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510 Phone 203-773-2022 Fax 203-773-2631 <Mark_Kravitz@ctd.uscourts.gov>	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215 Phone 734-764-4347 Fax 734-763-9375 <coopere@umich.edu>

CHAIRS and REPORTERS (CONTD.)

Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101 Phone 206-553-6300 Fax 206-553-6306 <judge_tallman@ca9.uscourts.gov> <Alice Rosenbach/CA09/09/USCOURTS>	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Rd. Box 90360 Durham, NC 27708-0360 Phone 919-613-7091 Fax 919-668-0995 <sun@law.duke.edu>
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717 Phone 850-521-3601 Fax 850-521-3610 <robert_hinkle@flnd.uscourts.gov>	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023 Phone 212-636-6855 Fax 212-636-6899 <dcapra@law.fordham.edu>

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair:	**Reporter:**
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 <lee_rosenthal@txs.uscourts.gov> <Sheila_Logullo@TXS.USCOURTS.gov>	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459 Phone 617-552-8650 Fax 617-496-4867 <Coquille@Law.Harvard.edu>
Members:	
Honorable Harris L Hartz United States Circuit Judge United States Court of Appeals 201 Third Street, N.W., Suite 1870 Albuquerque, NM 87102 Phone 505-843-6196 Fax 505-843-6202 <Judge_Harris_Hartz@ca10.uscourts.gov>	Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818 Phone 718-613-2490 Fax 718-613-2497 <Reena_Raggi@CA2.uscourts.gov> <Amanda.Black@CA2.uscourts.gov>
Honorable Diane P. Wood United States Court of Appeals 2602 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604 Phone 312-435-5521 Fax 312-408-5117 <Chambers_of_ Judge_D_Wood@CA7.uscourts.gov>	Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101 Phone 619-557-6016 Fax 619-702-9922 <Marilyn_L_Huff@CASD.uscourts.gov>

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146 Phone 602-322-7560 Fax 602-322-7569 <james_teilborg@azd.uscourts.gov>	Honorable Ronald M. George Chief Justice Supreme Court of California 350 McAllister Street San Francisco, CA 94102 Phone 415-865-7060 Fax 415-865-7181 <ronald.george@jud.ca.gov> <kate.lucchio@jud.ca.gov> <ahmoi.kim@jud.ca.gov>
Professor Daniel J. Meltzer Harvard Law School 1545 Massachusetts Avenue Cambridge, MA 02138 Phone 617-495-4659 Fax 617-496-4865 <meltzer@law.harvard.edu>	David J. Beck, Esquire Beck, Redden & Secrest, L.L.P. One Houston Center 1221 McKinney Street, Suite 4500 Houston, TX 77010 Phone 713-951-3700 Fax 713-951-3720 <dbeck@brsfirm.com>
John G. Kester, Esquire Phone 202-434-5000 Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, DC 20005-5901 Phone 202-434-5000 Fax 202-434-5029 <jkester@wc.com>	William J. Maledon, Esquire Osborn Maledon, P.A. 2929 North Central Avenue, Suite 2100 Phoenix, AZ 85012-2794 Phone 602-640-9331 Fax 602-640-6079 <wmaledon@omlaw.com>
Douglas R. Cox, Esquire Gibson, Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036-5306 Phone 202-955-8500 Fax 202-467-0539 <dcox@gibsondunn.com>	Acting Deputy Attorney General (ex officio) Honorable Craig S. Morford U.S. Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530 Phone 202-514-2101 Fax 202-514-0467 <Craig.S.Morford@usdoj.gov>

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Advisors and Consultants: Professor Geoffrey C. Hazard, Jr. Hastings College of the Law 200 McAllister Street San Francisco, CA 94102 Phone 415-565-4800 Fax 415-565-4865 <hazardg@uchastings.edu>	 Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933 Phone 517-371-5140 Ext. 2601 Fax 517-334-5781 <kimblej@cooley.edu>
Joseph F. Spaniol, Jr., Esquire 5602 Ontario Circle Bethesda, MD 20816-2461 Phone 301-229-2176 (Call first.) Fax 301-229-2176 <JFSJR@comcast.net>	
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Peter_McCabe@ao.uscourts.gov>	

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Kenneth J. Meyers	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <John_Rabiej@ao.uscourts.gov>	James N. Ishida Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <James_Ishida@ao.uscourts.gov>
Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Jeffrey_Barr@ao.uscourts.gov>	Timothy K. Dole Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Timothy_Dole@ao.uscourts.gov>
Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Gale_Mitchell@ao.uscourts.gov>	Adriane Reed Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1766 <Adriane_Reed@ao.uscourts.gov>
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1900 Fax 202-502-1988 <James_Wannamaker@ao.uscourts.gov>	Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544 Phone 202-502-1900 Fax 202-502-1988 <Scott_Myers@ao.uscourts.gov>

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4084 Fax 202-502-4199 <jcecil@fjc.gov>	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 <mleary@fjc.gov>
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4074 Fax 202-502-4199 <bniemic@fjc.gov>	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4049 Fax 202-502-4199 <twillgin@fjc.gov>
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 <lhooper@fjc.gov>	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4097 Fax 202-502-4199 <treagan@fjc.gov>

Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Lee H. Rosenthal Chair	D	Texas (Southern)	Chair: 2007	2010
David J. Beck	ESQ	Texas	2003	2009
Douglas R. Cox	ESQ	Washington, DC	2005	2008
Ronald M. George	CJUST	California	2006	2009
Harris L. Hartz	C	Tenth Circuit	2003	2009
Marilyn L. Huff	D	California (S)	2007	2010
John G. Kester	ESQ	Washington, DC	2004	2010
William J. Maledon	ESQ	Arizona	2005	2008
Daniel J. Meltzer	ACAD	Massachusetts	2006	2009
Craig S. Morford *	DOJ	Washington, DC	N/A	N/A
Reena Raggi	C	Second Circuit	2007	2010
James A. Teilborg	D	Arizona	2006	2009
Diane Wood	C	Seventh Circuit	2007	2010
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Principal Staff: Peter G. McCabe 202-502-1800
John K. Rabiej 202-502-1820

* Ex-officio

1A.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 11, 2008

****

All of the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

****

At its March 11, 2008 session, the Judicial Conference of the United States:

Elected to the Board of the Federal Judicial Center, each for a term of four years, Judge Loretta A. Preska of the District Court for the Southern District of New York to succeed Judge Bernice B. Donald of the District Court for the Western District of Tennessee, and Judge Susan H. Black of the Court of Appeals for the Eleventh Circuit to succeed Judge Terence T. Evans of the Court of Appeals for the Seventh Circuit.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Redesignated Bankruptcy Judge Stephen D. Gerling's duty station in the Northern District of New York from Utica to Utica, Syracuse, or Albany.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Endorsed a revised privacy policy for public access to the electronic case file documents system.

Approved amendments to the Bankruptcy Court Miscellaneous Fee Schedule and directed the Administrative Office to amend the language and numbering of the schedule accordingly.

Amended the Electronic Public Access Fee Schedule to eliminate any reference to dial-up access.

Agreed to pursue the authority for courts of appeals and bankruptcy appellate panels to dispose of paper records received after December 1, 2006, that are converted to PDF for use in CM/ECF, and agreed that any courts utilizing the CM/ECF system need not retain

paper records for archival purposes after they have been scanned in their entirety into the CM/ECF system.

Endorsed disposition authority to allow paper records created or received by probation and pretrial services offices to be scanned into PACTS and the paper copies to be destroyed, and agreed that offices utilizing PACTS need not retain paper records for archival purposes after they have been scanned in their entirety into PACTS, with the exception of original Sex Offender Registration Acknowledgment Forms, Monthly Supervision Reports (MSR), and any other document bearing the defendant's/offender's original signature which is submitted under oath or includes a warning that false statements may be punishable pursuant to 18 U.S.C. § 1001.

Rescinded its earlier endorsement of a legislative proposal to allow the Southern District of Iowa to occasionally hold civil trials upon consent in Omaha, Nebraska.

COMMITTEE ON CRIMINAL LAW

Agreed to seek legislation that would—

a. provide to probation officers conducting searches the same powers available to traditional law enforcement officers to control and direct third parties when safety considerations require; and

b. permit probation officers to arrest, based on probable cause, persons who assault, resist, or impede the officer in the performance of official duties.

Agreed to seek legislation that would authorize pretrial services supervision for juveniles released prior to the disposition hearing stage of the proceedings.

Approved revisions to *The Supervision of Federal Offenders*, Monograph 109.

Approved revisions to *The Federal Home Confinement Program For Defendants and Offenders*, Monograph 113, and agreed to change the title of the monograph to *The Location Monitoring Program.*

COMMITTEE ON DEFENDER SERVICES

Approved revisions to paragraph 2.01E(5) of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes, volume 7, *Guide to Judiciary Policies and Procedures,* to reflect the restructuring of the Immigration and Naturalization Service and resulting changes in statutory terminology regarding immigration proceedings.

COMMITTEE ON THE JUDICIAL BRANCH

Agreed to seek legislation that would authorize a one-time open season for judges who previously opted not to enroll in the Judicial Survivors' Annuities System (JSAS) under the following conditions: (a) such enrollees, while in active or senior status, would be required to pay 2.75 percent of future pay (instead of the current 2.2 percent) to maintain the current employer contribution of 1.48 percent; and (b) those enrollees would be permitted to make a deposit equaling approximately 2.75 percent of salary, plus 3 percent annual, compounded interest, for the last 18 months of prior service, to receive the credit for prior judicial service required for immediate coverage and protection of the enrollees' survivors.

Agreed to seek legislation that would permit the resumption of periodic payments of JSAS survivor benefits following termination of a judicial survivor's remarriage, but would limit any lump-sum retroactive payments to the time beginning on the date the survivor's remarriage is ended by death, divorce or annulment and ending on the date on which periodic annuity payments resume.

Approved an amendment to section E.4. of the Travel Regulations for United States Justices and Judges to clarify and specify the nature and amount of a judge's entitlement to reimbursement for the expenses of meals and incidentals incurred in same-day travel.

Approved an amendment to section F.2. of the Travel Regulations for United States Justices and Judges specifically to authorize judges' reimbursement for tips to parking attendants.

Approved an amendment to section B.3. of the Travel Regulations for United States Justices and Judges to give chief judges in states with multiple districts the discretion to hold one inter-district meeting annually.

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

Adopted Rules for Judicial-Conduct and Judicial-Disability Proceedings to become effective April 10, 2008.

COMMITTEE ON JUDICIAL RESOURCES

Agreed to amend its "Compensatory Time for Court Employees" policy to allow courts to provide compensatory time when employees are required to travel outside of their normal work schedules, to reduce the minimum compensatory time increment from one hour to 15 minutes, and to extend the period for using compensatory time from six months to one year.

Agreed to express to the congressional sponsors and the Office of Personnel Management the support of the judiciary for changes to improve the crediting of unused sick leave for employees who retire under the Federal Employees Retirement System.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Amended section 3.03(b) of the Judicial Conference's regulations for the selection and appointment of magistrate judges to permit a court or merit selection panel to publicize the names of applicants, with their written permission.

Approved recommendations regarding specific magistrate judge positions, including increases in the salaries of two part-time magistrate judge positions in one district court.

COMMITTEE ON SPACE AND FACILITIES

With regard to asset management planning (AMP):

a. Approved the key features of the AMP methodology; and

b. Delegated to the Committee authority to establish and amend the business rules that will govern the AMP methodology approved by the Judicial Conference.

Rescinded its decision to terminate the judiciary's participation in the General Services Administration's (GSA) building delegation program only for the Hugo L. Black Courthouse in Birmingham, Alabama, with the understanding that (a) annual costs incurred by the judiciary will not exceed those appraised operating costs estimated by GSA; and (b) in the event of a catastrophic event or natural disaster warranting repair to the building, the management of the building will be returned to GSA if funding cannot be obtained by the judiciary to repair the facility.

Approved a list of exceptions to the *U.S. Courts Design Guide* and the objections noted to certain of those exceptions, with the understanding that the judiciary is still discussing the objections with GSA.

Approved the *Five-Year Courthouse Project Plan for FYs 2009-2013*.

Amended the *U.S. Courts Design Guide* policy on providing a special proceedings courtroom to read as follows:

> A special proceedings courtroom shall be considered an exception if it is provided at a location other than the district headquarters or if there are fewer than four district judge courtrooms (even in a headquarters location). Provision of more than one such courtroom in any facility is also considered an exception.

1B.

April 23, 2008

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 23, 2008

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024, and new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2008, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

April 23, 2008

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendment to Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions that had been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Committee Note submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 23, 2008

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions be, and they hereby are, amended by including therein the amendment to Rule C.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendment to the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions shall take effect on December 1, 2008, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 23, 2008

Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 23, 2008

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41, 45, 60, and new Rule 61.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2008, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

2.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 14-15, 2008
Pasadena, California
Draft Minutes

TABLE OF CONTENTS

Attendance..... 1
Introductory Remarks..... 3
Approval of the Minutes of the Last Meeting..... 3
Report of the Administrative Office..... 3
Report of the Federal Judicial Center..... 4
Reports of the Advisory Committees:
Appellate Rules..... 4
Bankruptcy Rules..... 7
Civil Rules..... 10
Criminal Rules..... 27
Evidence Rules..... 33
Report of the Sealing Subcommittee..... 34
Report of the Time-Computation Subcommittee... 35
Report on Standing Orders..... 36
Bell Atlantic v. Twombly Panel Discussion..... 37
Closing Remarks and Next Committee Meeting.... 45

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Pasadena, California, on Monday and Tuesday, January 14 and 15, 2008. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Ronald J. Tenpas, Associate Deputy Attorney General
Professor Daniel J. Meltzer
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Chief Justice Ronald N. George was unable to attend the meeting.

Also participating in the meeting were former chairs Judge Alicemarie H. Stotler and Judge Anthony J. Scirica; former member Judge Thomas W. Thrash, Jr.; and Professor Stephen B. Burbank, Gregory P. Joseph, David M. Bernick, and Elizabeth J. Cabraser.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Administrative Office senior attorney
Jeffrey N. Barr	Administrative Office senior attorney
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk
Professor Geoffrey C. Hazard, Jr.	Committee consultant

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor Jeffrey W. Morris, Reporter
Professor Elizabeth Gibson, Assistant Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed Judges Wood, Raggi, and Huff as new members of the committee and Judges Tallman, Kravitz, Hinkle, and Swain as new advisory committee chairs. She also welcomed Professor Gibson as the next reporter to the Advisory Committee on Bankruptcy Rules.

Judge Rosenthal noted with regret that Judge Thrash's term on the committee had ended, and he was attending his last meeting. She extolled his extraordinary service as a member of the Style Subcommittee and his central role in the restyling of the Federal Rules of Civil Procedure. She also pointed out that Judge Thrash had exerted unique influence in shaping the content of committee notes. He reminded the committee regularly, she said, that notes have a very important, but limited, purpose. They should not reach beyond the scope of a rule's text nor be relied upon to carry more weight than they should properly bear. She presented him with a resolution signed by the Chief Justice honoring his service on the committee from 2000 to 2007.

Judge Rosenthal reported that all the rules proposals submitted by the committee had been approved by the Judicial Conference at its September 2007 session, including new FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work product protection) and amendments to the criminal rules to implement the Crime Victims' Rights Act. She reported that several additional amendments had been published for comment in August 2007, most significantly the package of time-computation rules. She also pointed out that the restyled body of civil rules and the new privacy protection rules implementing the E-Government Act had taken effect on December 1, 2007.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 11-12, 2007.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported briefly on three pieces of legislation affecting the rules process. First, he said, proposed new FED. R. EVID. 502 had been introduced in the Senate and appeared to have very strong legislative support. Second, legislation promoted by the bail bond industry for several years now stood a good chance of enactment in the current Congress. Strongly opposed by the Judicial Conference, it would limit the authority of a judge to forfeit a bail bond for violation of any condition of

release other than the defendant's failure to appear. In light of the strong possibility of enactment, compromise language was being drafted to limit the scope of the overly broad legislation. Third, a bill had been introduced that would require a judge, before issuing a protective order, to make specific findings that there is no danger to the community's public health or safety in the materials protected by the order. Although the legislation had been introduced several times in the past, he said, it had been approved by the Senate Judiciary Committee in the current Congress and was developing momentum.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the various activities of the Federal Judicial Center (Agenda Item 4).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 12, 2007 (Agenda Item 5).

Amendment for Publication

FED. R. APP. P. 29

Judge Stewart reported that the advisory committee, over the course of several meetings, had discussed amending Rule 29 (amicus curiae brief) to conform it to Supreme Court Rule 37.6. He noted that the advisory committee had submitted a proposed amendment to the Standing Committee in June 2007. But later, the Supreme Court published for comment a proposed amendment to Rule 37.6 that would require the filer of an amicus curiae brief to disclose whether a party or its counsel was a member of the amicus or had contributed money to preparing or submitting the brief.

The proposed amendment to the Supreme Court rule, he said, had generated controversy and some strongly critical comments. Therefore, not knowing whether the Court would adopt the proposed amendment as published, the advisory committee asked the Standing Committee in June 2007 to consider two alternative revisions of FED. R. APP. P. 29. One would be published if the Supreme Court were to approve the proposed amendment to Rule 37.6. The other would be published if the Court were to withdraw the proposed amendment. The Standing Committee, however, decided to defer any action on Rule 29 until after the Court made a final decision on Rule 37.6.

Ultimately, the Supreme Court revised the proposed amendment to Rule 37.6 in light of public comments. It adopted a revised rule that does not require disclosure of mere membership in an amicus group or mere payment of membership dues. Rather, disclosure is required only if a financial contribution is intended to fund the amicus brief.

Accordingly, the advisory committee at its November 2007 meeting further revised FED. R. APP. P. 29 to track the new Supreme Court rule in substance, but with some slight differences of style. For instance, the proposed Rule 29(c) refers to persons, rather than entities, making contributions. The committee note explains that "person" includes artificial persons such as corporations. A member observed that repetition of the word "other" in proposed Rule 29(c)(7)(C) was confusing, *i.e.,* "identifies every other person – other than the amicus curiae, its members, or its counsel." Judge Stewart and Professor Struve agreed to delete the first "other."

Another member suggested that it makes sense to follow the Supreme Court rule, but the phrasing in Rule 29(c)(7)(A) as to "whether a party's counsel authored the brief in whole or in part" is ambiguous and leaves a large loophole. The ambiguity, he noted, exists in the current Supreme Court rule, and he suggested that the rule has largely been honored in the breach. Professor Struve responded that experience under the Supreme Court rule may have clarified where the proper lines are to be drawn regarding disclosure. The advisory committee, she said, had considered the matter carefully and had concluded that good faith coordination between counsel and an amicus is perfectly appropriate, as distinguished from counsel actually authoring or funding the amicus brief. The rule, she said, was designed to prevent parties from using amicus briefs to evade page limitations on the main briefs. Thus, precise line drawing may be relatively unimportant.

The Committee without objection by voice vote approved the amendments for publication, with deletion of the first "other" in the proposed Rule 29(c)(7)(C).

Informational Items

Judge Stewart reported that the advisory committee in 2003 had voted for an amendment to FED. R. APP. P. 7 (bond for costs on appeal in a civil case) that would resolve a 2-2 split among the courts of appeals and specify that attorney's fees incurred on appeal cannot be included in the "costs" to be secured. The advisory committee, though, had deferred bringing the proposal to the Standing Committee in order to bundle it with other proposed amendments.

But since that time, two additional courts of appeals have held that attorney's fees may be included in "costs." The circuit split on this question, accordingly, is now 4-2 in favor of including attorneys' fees. The proposed amendment to Rule 7, thus, now runs

against the weight of circuit precedent. Therefore, Judge Stewart said, the advisory committee was reconsidering the proposal and seeking additional research on the matter.

Professor Struve explained that the proposal would have barred attorney's fees under Rule 7 because of the risk that large appeal bonds could chill meritorious appeals. She noted that there have been cases in which substantial appeal bonds have been ordered, particularly in class action cases where it was feared that certain class action objectors might bring obstructive appeals.

She said that the advisory committee would like to learn more about current law and practice, and it is seeking empirical data about the types of cases that raise attorney's fee issues, the size of appeal bonds, and whether bonds have deterred appeals from proceeding. The committee, he said, expected to receive preliminary research results at its spring 2008 meeting and might consider an amendment to the rule at its fall meeting. Among the many options for a possible amendment, she explained, would be to allow some attorney's fees, but not others, allow them only if a statute defines attorney's fees as part of "costs," or allow them only with certain specified conditions. Another option, of course, would be for the advisory committee to recommend no change in the rule. She added that the advisory committee was also considering holding a mini-conference on fees at its fall meeting.

Judge Stewart reported that the advisory committee had discussed the recent Supreme Court decision in *Bowles v. Russell* identifying as jurisdictional the time limits for filing a civil appeal. *Bowles* held that the limits set forth in FED. R. APP. P. 4(a)(6) to reopen the time to file an appeal are jurisdictional in nature because they reflect a choice made by statute. Thus, a court cannot waive the deadline based on the court-made "unique circumstances" doctrine.

Professor Struve noted that the holding in *Bowles* has implications for other deadlines set forth in FED. R. APP. P. 4 and other federal rules. Many rules, including FED. R. APP. P. 4, include some deadlines that are "statutory" and some that are not. Over the years, moreover, there have been many amendments to Rule 4 through the rule-making process that effectively changed statutorily based, jurisdictional deadlines. The results for a litigant in a given case, if some of these time deadlines are jurisdictional, could be disastrous. The case law is developing following *Bowles*, so the advisory committee may decide to wait before taking any action. She noted, too, that the Supreme Court had granted certiorari in *John R. Sand & Gravel Co. v. United States,* 128 S.Ct. 750 (2008), a Tucker Act case that may relevant.

Judge Stewart observed that some advisory committee members believe that the problems created by *Bowles* will require a statutory response by Congress and that the rules committees lack authority to address the problem. The committee, he said, needed

time to review whether the various time limits in the rules are statutorily based and whether they can be changed by rule. It might decide to take no action at this time and let the issue play out in the courts.

Judge Stewart reported that the advisory committee had considered a proposal to amend FED. R. APP. P. 4 to treat the states the same as the federal government and give state attorneys general additional time to respond to complaints and other filings. After much discussion, there was little support in the advisory committee for the proposal. It therefore informed the Solicitor General of Virginia, who had raised the matter, that it would not take any action at this time, but the matter could be raised again in the future.

Judge Stewart noted that the advisory committee would also consider the recent decision in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007), regarding the separate judgment rule, and it would consider a suggestion that the prisoner mail box rule be reviewed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Morris presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of December 11, 2007 (Agenda Item 9).

Judge Swain thanked Judge Zilly, the outgoing committee chair, for his brilliant and tireless work in shepherding the advisory committee through the enormous project of implementing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. She also thanked Professor Morris for his outstanding service as the committee's reporter and introduced Professor Gibson as his successor. She noted that the terms of Judges Christopher Klein and Mark McFeely had expired and that Judges David Coar, Jeffrey Hopkins, and Elizabeth Perris had been appointed to the committee.

Amendments for Publication

FED. R. BANKR. P. 1007(a) and (c)

Professor Morris reported that the advisory committee was proposing two amendments to Rule 1007 (lists, schedules, statements, and other documents that a debtor must file) that would adjust deadlines for filing documents. The first would shorten from 15 days to 7 days the time for a debtor to file a list of creditors after entry of an order for relief in an involuntary case. The list is needed for the court to send notices to creditors.

The second change would extend from 45 days to 60 days the time for an individual chapter 7 debtor to file the required statement that he or she has completed a personal financial management course. He added that the bankruptcy clerk would send a notice within 45 days to remind the debtor of the 60-day deadline. The revised procedure, he said, would avoid the necessity of having to close and later reopen a case because of the debtor's failure to file the required statement.

FED. R. BANKR. P. 1019

Professor Morris explained that the proposed amendments to Rule 1019 (conversion of a case to chapter 7) would break subdivision (2) of the rule into two separate paragraphs. The existing text would become paragraph (2)(A). A new paragraph (2)(B) would be added to provide creditors and the trustee a new time period to object to a debtor's exemption claim after a case has been converted to chapter 7. Currently, creditors in chapter 11, 12, or 13 cases have no incentive to file objections because they will normally be taken care of in the debtor's plan. But if the case is later converted to chapter 7, they have lost their chance to object to exemptions. The new time period to file objections will not arise, however, if conversion to chapter 7 occurs more than one year after the first order confirming a plan, even if the plan later is modified. It also will not arise if the case had been pending previously under chapter 7 and the time to object had expired in the earlier chapter 7 case.

FED. R. BANKR. P. 4004 and 7001

Professor Morris said that the proposed amendments to Rules 4004 (grant or denial of discharge) and 7001 (scope of the Part VII rules) are related and deal with objections to discharge. Historically, objections to discharge have had to be filed as adversary proceedings. But some types of objections are essentially ministerial in nature and should not require a complaint or invoke the Part VII rules.

The advisory committee decided to allow some objections to discharge to be filed by way of motion as a contested matter, rather than by complaint as an adversary proceeding. Thus, Rule 7001(a) would be amended to provide an exception for objections to discharge based on failure of the debtor to file a statement of having completed a personal financial management course. Rule 4004(c) would be amended to include a new deadline for filing the motion objecting to a debtor's discharge. In addition, new Rule 4004(c)(4) would require the court to withhold a discharge if a chapter 13 debtor or individual chapter 11 debtor has not filed a statement of having completed a personal financial management course.

The committee without objection by voice vote approved publication of the proposed amendments for publication.

Informational Items

Judge Swain summarized briefly the proposed amendments published for comment in August 2007, including the package of time-computation amendments. She noted that the proposed amendment to FED. R. BANKR. P. 8001 (manner of taking appeal) would likely encounter opposition. It would extend the time to file a notice of appeal in a bankruptcy case from 10 days to 14 days. Historically, she said, the deadline for a bankruptcy appeal has been 10 days. At one point, the rule had been changed to extend the time to 14 days, but it was soon returned back to 10 days as a result of complaints from the bankruptcy community. She noted that the committee was also seeking comment on a more radical suggestion to raise the appeal period in bankruptcy to 30 days to conform with the appeal deadline for civil cases.

Judge Swain reported that the Executive Committee of the Judicial Conference had approved Official Forms 22A, 22B, and 22C (the debtor's means test). She explained that the new forms implement a provision of the 2005 omnibus bankruptcy reform legislation requiring a debtor's general living expenses to be calculated by applying the monthly expense amounts specified in national and local standards issued by the Internal Revenue Service.

She said that the committee had been caught off guard when IRS decided to change the expense standards on October 1, 2007. The guidelines are for IRS's own use in beginning negotiations with debtors, and IRS apparently had not realized that the 2005 bankruptcy legislation had elevated them to statutory importance. She explained that, thanks to help from the Executive Office for United States Trustees and Christopher Kohn, the Justice Department's representative to the advisory committee, the committee was able to reach an agreement with IRS to postpone the effective date of the changes for bankruptcy purposes until January 1, 2008. The deferral gave the committee time to revise the forms to conform with the new IRS standards.

Judge Swain made the general observation that the advisory committee had been very active in the past few years, principally in implementing the massive new bankruptcy legislation. The members, she said, recognize that the volume of changes may be unsettling to the bench and bar. But the committee does not expect that changes in the near future will be nearly as broad or significant, absent further legislation. The respite, she said, will give the bench and bar time to absorb the changes.

She reported that the next project on the advisory committee's agenda was to modernize, rationalize, and reorder the official bankruptcy forms. She explained that the statute, rules, and forms require debtors to file a great deal of specific information about their financial condition, which is filed with the court on various schedules, statements, and lists. The forms for this purpose, she said, had been developed at different times and

may contain duplication and inconsistencies. Moreover, the forms are difficult for the advisory committee to work with because the paper versions cram a great deal of information onto a page, and they often have small print and many check boxes.

She reported that the advisory committee had formed an ad hoc subcommittee to consider the content of the forms, the manner in which information is requested, how it is used, and how technology can be used to simplify and improve the flow of information. She noted that the committee would like to integrate the forms into CM/ECF, the courts' case management and electronic files system, to take maximum advantage of present and future technological advances. She anticipated that the working phase of the project might take about 3 to 5 years and that changes in the rules and official forms might take effect in 5 to 7 years.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of December 17, 2007 (Agenda Item 6).

Informational Items

FED. R. CIV. P. 56

1. Explanation of the Proposed Amendments

Judge Kravitz commended Judge Michael Baylson for his outstanding accomplishments in chairing a special subcommittee to revise Rule 56 (summary judgment). He reported that the subcommittee had focused on summary judgment practice in the district courts and had reviewed the local court rules of each district court. It had conducted two very productive mini-conferences with a cross-section of lawyers from large and small firms, judges, and law professors. The subcommittee, he explained, was proposing a complete restructuring of Rule 56. The advisory committee had not yet considered a final proposal, but planned to do so at its April 2008 meeting, with an eye to submitting a proposal for publication to the Standing Committee in June 2008.

Judge Kravitz noted that Rule 56 had not been changed significantly since 1963, and current practice in the courts bears no relationship to the text of the national rule. Summary judgment procedure, essentially, is governed by a myriad of local rules that are inconsistent with each other. He pointed out, moreover, that partial summary judgment is granted regularly by the courts, but is not even mentioned in the rule. The national rule, he said, should reflect this feature of summary judgment practice.

Judge Kravitz emphasized that the advisory committee had agreed not to change the substance of the standard for summary judgment, and it has also worked hard to assure that any amendments to the rule are not tilted towards either plaintiffs or defendants. Professor Cooper explained that the intent of the proposed amendments is to accept unchanged the standard for summary judgment drawn from the Supreme Court's 1986 *Celotex* trilogy, and not to attempt to articulate it. The burdens on the moving party are closely related to the standard, so the draft does not specify them directly.

Professor Cooper pointed out that subdivision (a) of the new rule moves up to the beginning of the rule the basic proposition that a court may grant summary judgment. This improves the flow of the rule and is similar to FED. R. CIV. P. 50 (judgment as a matter of law), which also starts with a statement of the court's authority. Subdivision (a) also adds the new proposition that the court must state the reasons for granting the motion, and it should state the reasons for denying the motion.

The principal procedural innovation in the subcommittee's proposed rule, found in subdivision (c), is to require a party moving for summary judgment to file a statement of those material facts that it asserts are not genuinely in dispute and entitle it to summary judgment. The statement must be in separate numbered paragraphs and contain citations to the record. The opponent of the motion must then respond paragraph by paragraph to those assertions. Subdivision (e) addresses what the court may do if the parties do not comply with subdivision (c). The rule, he explained, is a default rule that will work well in most cases, but there are some cases, especially complex cases, in which a court will want to order a different procedure.

This statement-and-response procedure, he said, is currently in wide use in the district courts. The subcommittee, he added, was continuing to improve the language of the draft in light of suggestions and criticisms raised at the mini-conferences and elsewhere. In addition, he said, the Federal Judicial Center had conducted excellent research for the subcommittee to identify how this type of procedure affects summary judgment practice in the courts now using it. In doing so, the Center measured such matters as the number of motions filed, disposition times, and outcomes.

Judge Kravitz asked the Standing Committee to consider some important threshold policy questions: (1) whether there should be a national summary judgment rule at all; (2) what that rule should specify; and (3) whether summary judgment should continue to be left to local preferences. Lawyers, he said, complain that they have to deal with very different practices among the courts and among judges. He suggested that a national judicial system should not have radically different procedures from district to district in such an important area of civil litigation as summary judgment.

With regard to the content of a rule, he said that many courts require the parties to file statements of uncontested facts. He noted, though, that there have been criticisms of the procedure and anecdotes of bloated, lengthy statements of undisputed facts that are burdensome and expensive to respond to. The subcommittee, he said, had worked hard to craft a rule that would make the statements more concise and meaningful and sharpen the focus of the issues for the court to decide. It would also allow parties to accept facts as undisputed for purposes of the motion only, and not for trial. Requiring specific citations to admissible evidence is another way that the rule attempts to discipline the practice. The subcommittee, he said, was continuing to wrestle with several remaining issues, such as the appropriate remedies for noncompliance with the rule.

Mr. Cecil reported that the Federal Judicial Center's research had examined summary judgment practices in the district courts. He pointed out that 20 districts require a moving party to file a statement of uncontested facts and the other party to respond in kind. Another 36 districts require a statement from the movant, but not a point-by-point response. The remaining 36 districts studied do not require statements.

The Center, he said, had compared the three groups and generally found no measurable differences among them except in two areas. The numbers seemed to indicate that in those districts that have local rules akin to the subcommittee's proposed rule, it takes longer to resolve summary judgment motions. The researchers, though, doubt that the result can be attributed to local procedure, but rather to other factors such as a court's overall caseload. It also appeared from the research that more employment discrimination cases are terminated by summary judgment in the districts that use the proposed rule, as compared to those that do not. Mr. Cecil added that these two preliminary findings would be explored further.

Judge Kravitz observed that revision of Rule 56 will affect the entire legal community. It has been suggested, he said, that the greatest potential opposition to change will come from judges whose own local practice differs from the proposed national rule.

Judge Kravitz explained that a judge may change the proposed procedure in a particular case, but a court may not adopt a local rule or standing order opting out of the national rule. Nor may an individual judge do so with a standing order.

2. Comments and Suggestions from Committee Members

A member observed that some judges issue the same pretrial order in every case. While not technically a standing order, the practice is the functional equivalent of issuing a standing order. Professor Cooper explained that the rule defers to a judge's preferences in this situation. A major problem with standing orders, he said, is that they are difficult for practitioners to find, and there are real concerns as to whether practitioners actually receive adequate notice of the content of standing orders. But if a judge issues the same order in every case, notice is not a problem because the parties actually receive specific notice. Judge Kravitz added that the intent and spirit of the proposal is not to allow an individual judge to opt out of the national rule in every case. It might be appropriate, though, for a judge to have special procedures for certain categories of cases, such as patent cases.

A member objected that blanket opt-outs would clearly be contrary to the spirit of the proposal, although nothing in the rule would effectively prevent a judge from doing so. He suggested strengthening the language to specify that a judge may opt out only by an order "in an individual case." Judge Kravitz agreed to convey the suggestion back to the advisory committee. Another member disagreed, though, and argued that district judges should have the authority to issue orders opting out of the proposed default procedure in all their cases.

Judge Kravitz stated that some judges believe that the subcommittee proposal is a bad idea and will make lawyers do useless work. They are the judges who will likely opt out of the default rule in all cases. Nevertheless, he said, the rule has to give judges authority to opt out in appropriate cases, but not to opt out entirely from the national statement-and-response procedure in all cases. Some members predicted that, even under the proposed rule, there will continue to be substantial local experimentation and variations in handling summary judgment motions.

A member reported that the California state courts have used the statement-and-response requirement successfully and predicted that it will be well received in the federal courts. It will promote uniformity while allowing appropriate local flexibility. But the opt-out language should allow judges greater flexibility because there may be a need for variations in certain types of cases that the committee cannot currently anticipate. Flexibility, moreover, will make it easier for judges to accept the new rule.

Judge Kravitz added that the lawyers at the mini-conferences, drawn from all parts of the legal spectrum, were supportive of the proposed rule.

A participant recommended placing the concept of judgment as a matter of law at the beginning of the proposed rule in order to highlight the relationship of summary

judgment to a directed verdict at trial or a judgment n.o.v. In essence, a court should consider a summary judgment motion as a motion for a directed verdict. Integration of the two should be made closer. But there was an objection that this approach would encourage mini-trials.

Judge Kravitz explained that the proposed rule states as a default that summary judgment motions may be filed at any time up to 30 days after the end of discovery. A judge, though, normally fixes the time for filing summary judgment motions in each case at the initial Rule 16 pretrial conference.

A member stated that litigants are increasingly frustrated by the costs of discovery and are becoming increasing disgruntled with requests for admissions and inadequate responses to interrogatories. One way that a party can force movement in a case is by filing a motion for summary judgment. A defendant, thus, may file a "no evidence" motion for summary judgment in order to obtain cheap discovery from the other side about the evidence supporting its claims. Therefore, the rule might specify that a party may not file a "no evidence" motion for summary judgment until there has been some discovery.

Judge Kravitz responded that judges discuss these matters at pretrial conferences and may permit summary judgment motions to be filed at a later date. The proposed rule, he emphasized, is only a default provision designed to provide guidance to bench and bar. A court may change the time deadline by local rule. This is the only place in the rule where a court may change the national rule on a standing basis.

Professor Cooper explained that the subcommittee was of the view that it would be better not to set a time limit *before* which a party may not file a summary judgment motion. Rather, the rule sets a presumptive time-limit *after* which a party may not file. He said that this mechanism would work well in most cases.

A participant observed that great differences exist between preemptive summary judgment motions filed at the outset of a case and those filed after discovery, and the two may merit different procedures. Judge Kravitz noted, though, that in both situations there is benefit in having the movants state the uncontested facts. In the case of an early summary judgment motion, though, the opposing party may not be able to respond without being given additional time.

Judge Kravitz pointed out that proposed Rule 56(a) carries over the language of the current, restyled rule, which specifies that a court "should" grant summary judgment if there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. Before the restyling of the civil rules, FED. R. CIV P. 56 had specified that the court "shall" grant summary judgment. He noted that civil defense

lawyers have argued that a court should not have discretion to deny summary judgment when a party is entitled to it. Therefore, the word "should" should have been replaced with "must" during the restyling process.

Judge Kravitz explained that the subcommittee had simply retained the current, restyled language "should" to emphasize that it was making no substantive changes in the standard for summary judgment. Moreover, in restyling the rule, the committee chose "should" over "must" because there was some case law that had interpreted the word "shall" to give courts discretion to deny a well-founded summary judgment motion in appropriate circumstances.

A member insisted that the cases interpreting "shall" to mean "should" were wrong and inconsistent with the Supreme Court's ruling in *Celotex v. Catrett,* 477 U.S. 317 (1986). If the summary judgment standard is met, he said, the movant is "entitled" to summary judgment and "must" be granted it. The restyling decision to use "should" was wrong, he said, and the second sentence of the proposed new Rule 56(a), he added, is logically incoherent. How can a movant be "entitled" to summary judgment if the judge is permitted to deny it?

The reality, he suggested, is that some district judges prefer to go to trial rather than decide summary judgment motions. In doing so, they impose unfair expenses on defendants. He also suggested that the proposed rule is inconsistent because it states that a court "must" give reasons for granting summary judgment, but only "should" give reasons if it denies it. All in all, the message delivered by the new rule is a preference in favor of denying summary judgment. Instead, the rule should require the court to state reasons in both situations.

Judge Kravitz observed that these points have been echoed by others. The subcommittee, though, believed that the current language would save judges time because some summary judgment motions may be denied with little explanation. The sentiment on the subcommittee, he said, was to give judges some latitude in denying the motions.

Judge Kravitz added that changing "should" to "must" in Rule 56(a) would be inconsistent with circuit law. He cited situations in which it simply makes more sense to proceed to trial even though summary judgment may be justified. He also suggested that there might be some alternative formulation that would avoid the language problem altogether, such as by leaving the matter to existing circuit standards.

Professor Cooper explained that the word "may" had been used in the advisory committee's 1992 draft amendments to Rule 56. The committee concluded, however, that "may" was too weak and that "should" would carry more hortatory force. On the other hand, it rejected "must" or "shall" as too strong. The concept that the committee would like to

convey is "shall, if practicable," but it is difficult to encapsulate in rule language. In addition, he noted, it is not the same thing to use the word "must" for partial summary judgment as for complete summary judgment.

A member agreed that it makes sense to distinguish between partial and complete summary judgment. But if "must" is used, the committee would have to consider how it could be enforced. There is little that a court of appeals can do about violations of the rule, except perhaps in limited circumstances. The committee should not include language in the rule that would be unenforceable.

A member expressed a preference to retain "should," noting that there are many gray areas in litigation, and it makes sense in certain situations for a trial judge to go ahead and try a case rather than grant summary judgment. Maintaining the difference between "must" and "should" with regard to the judge giving reasons for granting or denying summary judgment makes perfect sense. A judge "must" state the reasons for granting summary judgment because the court of appeals needs to be able to review the reasons. But if the judge denies summary judgment, the ruling is not appealable in most cases, so there is no reason for specifying that the judge "must" state reasons.

Another member stated that it is very useful to the court of appeals for a district judge to write a detailed opinion when granting summary judgment, but wondered whether it should be required by the national rule. It would be better to leave it up to the respective courts of appeals to decide what supporting text is required for a trial court's decision. The rule might better specify that a judge "should" give reasons both for granting and denying summary judgment. This would avoid litigation over whether a district judge's statement of reasons is adequate.

A member cautioned that practitioners will view "should" in Rule 56(a) as a retreat from "shall." For that reason, the committee note should explain that no change in the law is intended. Another member stated a preference for "must" and suggested that part of the problem is that some practitioners move for summary judgment too often. The proper remedy, though, is to encourage courts to take action against lawyers who file needless motions.

Judge Kravitz reiterated that the language used in the subcommittee's draft rule – "should" – is the same as the current Rule 56. The committee, he said, has no intention of excusing judges from granting summary judgment when they should do so. The draft committee note is clearer on the point than the text of the rule, and it might be refined further.

A participant explained that the restyled rules had eliminated the word "shall" throughout the rules because it is a vague and ambiguous term interpreted in different ways. Instead, the restyled rules use the terms "may," "should," and "must" as a continuum from the

most judicial discretion to the least. The committee, he noted, had used these terms consistently, and the draft rule conforms with current usage and committee practice. "May" and "must" are clear terms, he said, but "should" is inherently more difficult to apply. It means that generally a judge or party must do something, but has some discretion not to do so in an unusual case.

A participant stated that trial judges must have flexibility to manage their caseload and suggested that the committee abandon both "should" and "must" and consider a formulation such as "granting the motion is appropriate," or "granting the motion is warranted." The committee note could explain that the revised rule does not change existing law on when summary judgment should be granted. Another participant agreed and suggested using language along the lines of: "Summary judgment is appropriate when . . . ." This would be similar to the formulation used in the Federal Rules of Evidence that "evidence is admissible when . . . ."

Professor Cooper reiterated that "should" is used in the current Rule 56, and the subcommittee had stuck with the existing language to emphasize that the proposal will not change the standard for summary judgment. Nonetheless, some lawyers apparently fear erosion of a moving party's entitlement to summary judgment.

A member objected that judges who decline to grant summary judgment when it should be granted do more than merely impose unnecessary costs for defendants. They also change the decision maker in the case, judge or jury. This is a matter of great importance to lawyers. Defense lawyers, for example, ask first whether a complaint will survive a motion for summary judgment. If it, in fact, survives summary judgment, they fear the unpredictability of a jury, especially if the case involves an unattractive defendant. So if a summary judgment motion is denied, the case will likely settle.

Judge Kravitz reported that in his own district, the statistics do not bear out the notion that juries favor plaintiffs. He said that he had held that view himself when he was a practitioner, but the numbers demonstrate that it is a myth in his district.

Judge Kravitz asserted that a consensus had clearly developed that there is a need to revise Rule 56. In addition, there seems to be a consensus supporting the subcommittee's proposed statement-and-response procedure. The only debate, he said, appears to be over the details of what the revised national rule should specify. Suggestions that he thought would be useful to bring back to the advisory committee include: (1) drafting a better formulation for the "should" vs. "must" language; (2) revising the committee note to explain more precisely what the committee is trying to do; and (3) examining circuit case law on the scope of a trial judge's discretion to grant or deny summary judgment.

Professor Coquillette emphasized that the Rules Enabling Act specifies that the rules committees are charged with maintaining consistency in the federal rules of procedure. But, he pointed out, Rule 56, as currently applied in the district courts, does not result in any consistent national practice. Judge Rosenthal added that the Federal Judicial Center's research had not addressed the practices of individual judges. She noted, though, that some judges use the proposed statement-and-response procedure even in districts that do not require it by local rule.

Judge Kravitz reported that lawyers have recommended that the rule specify how an attorney should present the common argument to the court that the movant is entitled to summary judgment because the claimant lacks facts to prevail on the merits of its claim. In addition, attorneys have reported that they often file motions to strike materials on the grounds that they are not admissible in evidence. Accordingly, he reported, the subcommittee had built into the proposed rule the ability of a moving party to assert that the claimant has no facts to support its claim. And proposed Rule 56(c)(2)(B)(ii) specifies that a moving party may state that the materials cited by the claimant to support a fact are not admissible in evidence. The provision is intended to obviate a need for a party to file a motion to strike.

Professor Cooper explained that proposed Rule 56(e) gives a judge several options when a response or reply does not comply with the rule or there is no response at all. First, the judge may give the respondent another opportunity to respond properly. Second, the judge may consider a fact accepted for purposes of the summary judgment motion. Third, the judge may grant summary judgment if the motion and the supporting materials show that the movant is entitled to it. Fourth, the judge may "issue any other appropriate order." The subcommittee, he said, had rejected the unstated alternative of permitting a court to grant summary judgment by default if a party fails to respond – without regard to what the motion and supporting materials might show.

Professor Cooper reported that lawyers at the recent mini-conferences had asked for guidance on what a court should do if a summary judgment motion itself is defective. But, he said, the subcommittee had decided that it was not worth addressing the matter in the rule because judges already have a great deal of experience in dealing with deficient filings. Judge Kravitz added that the rule deals only with nonconforming responses, but noted that plaintiffs' lawyers might perceive it as tilting towards defendants. Therefore, he suggested that the committee might want to add language, though not really needed, to defuse the suspicion, such as by specifying that Rule 56(e) applies to a nonconforming "motion," as well as to a nonconforming "response or reply."

A member noted that his circuit requires a district judge to examine the facts, even when there is no response. Often, a movant is wrong on the facts and not entitled to relief. There are many cases, moreover, where even if the facts were admitted, the movant would still not be entitled to summary judgment.

Professor Cooper stated that a number of local rules specify that if there is no response, the court may accept the facts and grant relief. Under the draft rule, however, the court must still consider all the materials submitted by the movant to establish entitlement and then decide on the record that there are no genuine disputes and that relief is appropriate. On the other hand, if a fact is deemed admitted, the judge has no independent obligation to search through the record to discover whether the fact might be controverted.

Judge Kravitz explained that the proposed rule requires a movant to cite to particular parts of materials in the record to support the facts that it argues are undisputed. By way of example, he suggested that if a motion were to state that a traffic light was green, but the cited portion of the record actually showed that the light was red, the movant's assertion that it was green cannot be "deemed admitted" by the court. On the other hand, if the cited portion of the record were to demonstrate that the light was green, the court need not search elsewhere in the record to see whether there may be anything to contradict the assertion.

A member agreed strongly and explained that it was common for judges to examine those portions of the record cited by movants in support of facts, only to find that they are nothing more than a party's own statements or opinions and not entitled to much weight. Thus, the rule must give the court discretion to deny summary judgment, even without a response, if the cited portions of the record simply do not make the case for summary judgment.

Judge Kravitz agreed that the rule must give a judge discretion to deem a fact admitted, and that is what the advisory committee had tried to accomplish in proposed Rule 56(e). He explained that many circuits require a judge or movant to send a special notice reminding pro se litigants that if they do not respond, facts may be admitted by the court. A member expressed strong approval of the provision as drafted and said that it would give the court appropriate tools and also defer to circuit law. If a party does not comply with the rule, the court must have discretion to do the right thing under the circumstances.

Some members questioned the relationship between subdivisions (a) and (g) of the proposed rule. The language of Rule 56(g) – "if summary judgment is not granted on the whole action" – appears to be inconsistent with the statement in Rule 56(a) that a party may move for summary judgment in whole or in part. It was generally agreed that the two provisions needed to be reconciled. In addition, subdivision (a) states that the court "should" grant summary judgment – presumably in whole or in part – if the movant makes the necessary showing. But subdivision (g) states that the court "may" grant partial summary judgment. It is not clear why there should be different standards for partial and total summary judgment. Perhaps Rule 56(g) should state that the court "should" grant partial summary judgment in order to track the language of Rule 56(a). But other members objected that the standard should be different for partial summary judgment.

Judge Kravitz reiterated that the committee was simply trying to carry through the existing standards for summary judgment. He agreed, though, that the committee needed to look more closely at the interrelationship between the two provisions.

A member stated that it seemed odd that proposed Rule 56(f) contemplates a judge acting in the absence of a motion for summary judgment. In an adversary system, it would be better for the court to invite a motion. Professor Cooper said that he did not recall the advisory committee having discussed this question explicitly. The focus of the provision, he said, was on the notice that a court must give when neither party moves for summary judgment, but the court believes that it may be warranted. Judge Kravitz added that Rule 56(f) only says that *sua sponte* summary judgment is permissible as long as the court provides notice and an opportunity to be heard.

Some members agreed that a judge should not have to invite a party to make a motion, but it makes little difference as a practical matter. If a judge invites a motion for summary judgment, a party will file one.

A participant asked whether the committee had contemplated requiring the court's notice that it is considering summary judgment *sua sponte* to be reflected on the record for the benefit of the court of appeals. Judge Kravitz suggested that the rule might provide for "notice on the record."

Judge Kravitz reported that the proposed rule does not address cost shifting directly, but the advisory committee would continue to examine the subject. At the last mini-conference with the bar, he said, a number of defense lawyers stated that they would like to have the court impose fees when a party's opposition to a summary judgment motion is made without any objective, reasonable basis, even though not necessarily in bad faith. But, he added, the subcommittee had decided not to incorporate fee-shifting in the rule expressly. Professor Cooper added that there was a great deal of concern by subcommittee members over the sensitivity of cost-shifting. A proposal to allow it explicitly would be viewed with considerable alarm by plaintiffs.

A participant noted that the rules already contain several cost-shifting provisions, and all pose essentially the same problems. He suggested that the committee examine all the provisions and craft a single cost-shifting provision to replace them all. Professor Cooper noted that there are also cost-shifting provisions in statutes, and it would be difficult to harmonize them all.

A member stated that FED. R. CIV. P. 11 (sanctions) should be sufficient to handle the cost-shifting issue. Making a plaintiff pay the costs will not have much practical impact because many plaintiffs are judgment-proof, and the existing cost-shifting provisions are not used very often.

Judge Rosenthal requested the participants to send any further thoughts on Rule 56 to Professor Cooper and Judge Kravitz. Professor Cooper added that the advisory committee would much rather hear concerns and issues now, rather than at the June 2008 Standing Committee meeting. A participant noted that the work on Rule 56 will also impact many of the state courts, and it should be of help to them as they revise their own summary judgment rules and procedures.

FED. R. CIV. P. 26

1. Explanation of the Proposed Amendments

Judge Kravitz reported that the committee had been working for a couple of years on expert witness issues. An ad hoc subcommittee chaired by Judge David Campbell, he said, had conducted several conferences and meetings that focused largely on three issues:

(1) whether non-retained experts, such as treating physicians, in-house employees, and law-enforcement officers, should be required to file a report with the court;
(2) whether drafts of experts' reports and communications between lawyers and retained experts should be subject to discovery; and
(3) whether communications between lawyers and retained experts waived work-product protections..

Judge Kravitz noted that the American Bar Association had adopted a resolution urging that federal and state discovery rules be amended to prohibit the discovery of draft expert reports and attorney-expert communications. He said that three principal reasons support amending Rule 26 (disclosures and discovery) to restrict discovery.

> First, sophisticated lawyers regularly opt out of the current rule by mutual agreement not to inquire into lawyer-expert communications or drafts of experts' reports.
>
> Second, good lawyers have expressed unease and discomfort over the way that they have to deal with experts under the current rule. They have to be careful in what they write and say to their experts, and they warn their experts not to write things down or prepare drafts. When they can afford it, parties even resort to retaining two sets of experts, one for consultation and one for testimony – because under the rule there is no discovery of communications of the former.
>
> Third, there is general agreement among lawyers that discovery under the current rule produces a great deal of cost and effort without attaining any corresponding benefits. In short, he said, the focus should be on the substance

of an expert's testimony, not on marginal issues surrounding the process of preparing the expert's reports.

Judge Kravitz said that the 1993 amendments to Rule 26 had produced unintended consequences. Virtually all lawyers that he has spoken with believe that changes in the rule are needed because there is too much games-playing and unnecessary expense under the current regime.

That being said, however, he added that drafting the proposed rule amendments was proving much more difficult than the subcommittee had expected. Appropriate line-drawing has proven tricky, and the advisory committee, he said, had not yet approved the final text of the proposed amendments. The suggested rule in the agenda book, he explained, was just for discussion purposes at this point. But, he added, Judge Campbell's subcommittee was unanimous in concluding that the drafts of expert witnesses should not be discoverable unless a party can prove a need for them under the work-product standard. As for communications with counsel, the subcommittee concluded that lawyers should be able to speak with an expert without those communications being subject to discovery.

Under the Rules Enabling Act, he noted, the rule-making process cannot create privileges. But it may provide protection for drafts of experts' reports and attorney-expert communications under the work-product rule, as was the case before the 1993 amendments to Rule 26.

The committee, moreover, cannot ignore the impact on the discovery process of the admissibility of drafts and communications at trial. It would not be productive, he suggested, for the committee's revised rule to prevent discovery of certain matters in the discovery process, only to have them inquired into at trial. The standard of protection, he suggested, should be the same for both discovery and trial. Otherwise, the artificial practices that the committee was seeking to minimize will still continue. This issue, he said, would be addressed in the committee note.

2. Disclosure of the Proposed Testimony of Non-Retained Experts

Judge Kravitz asked whether the members had any concerns about the portion of the proposed amendments that would require a new, simpler form of disclosure from non-retained experts, such as treating doctors, who are now exempt from the requirement that they file a full expert report.

A member questioned the advisability of creating another category of report that lawyers will have to prepare and asked how big a problem the current rule's exemption of certain witnesses from the report requirement really has been. He explained that he simply deposes the treating doctor in every case and does not need a report.

Judge Kravitz explained that the committee envisions not a "report," but just a disclosure. At present, a treating doctor may testify on matters dealing with causation or prognosis at trial, and the lawyer for the other side objects that the doctor is offering expert testimony without having filed an expert report. The case law, he said, is not uniform on the subject. Moreover, most treating doctors simply will not write a report. But, as a matter of fundamental fairness, some sort of disclosure should be required to notify the other party of the subject of the proposed testimony.

Members suggested that if the requirement is merely for a simple disclosure, and not a full "report," it would be far less costly. One expressed support for the concept of some sort of disclosure, but objected to the language of the proposed Rule 26(a)(2)(A)(ii) that would require the disclosure to state "the substance of the facts and opinions to which the witness is expected to testify." He said that the other side only needs to know what opinions the expert will express, not the "facts."

Members recommended including specific language in the rule to clarify the status of "mixed" or "hybrid" witnesses. They are mostly fact witnesses, but they also offer expert opinions. Lawyers argue frequently in court as to how much of the testimony is fact and how much is expert opinion. The real question, it was suggested, is how much disclosure should be made to the other party in advance, especially of witnesses who give both fact and expert opinion testimony. One member suggested that disclosure is not needed of all "facts and opinions." Another suggested that the proposed wording, "the substance of the facts and opinions," is too ambiguous, for it could mean either a brief summary or greater detail.

Judge Kravitz stated that there is a need for some sort of disclosure of the substance of a non-retained expert's proposed testimony, but not as much disclosure as in the case of a retained expert. He agreed that the committee should make the text of proposed Rule 26(a)(2)(A) clearer, and the rule and note should state more precisely what is required in the disclosure.

A participant observed that the rules already contain several different formulas for disclosure, and another is not needed. It would be better to refer to an existing standard in the rules and state, for example, that "a Rule 26(a) disclosure should be made." The Evidence Rules divide witnesses into two specific categories – fact witnesses and expert witnesses. But in fact, almost all witnesses fall into both categories. Perhaps the Evidence Rules should create a new category of witness that recognizes both aspects of their testimony.

A member suggested that one way to clarify the scope of the required disclosure would be to state that the lawyer's disclosure, plus any other materials the lawyer provides, must be sufficient to provide "notice" to the other side.

3. Protecting Drafts of Expert Reports and Attorney-Expert Communications

Judge Kravitz noted that it was important to reduce costs by providing protection for expert drafts and communications. The rule, however, should not create new litigation and should not put out of bounds matters that lawyers should be able to discover. Professor Cooper suggested that it might be helpful to change the requirement in Rule 26(a)(2)(B) from "data or other information considered" to "facts or data considered."

Judge Kravitz said that the subcommittee had decided to treat an expert's draft reports as protected by the work-product doctrine. Thus, a party could obtain expert draft reports only if it were able to establish a need and hardship. He added that there had been initial enthusiasm in the subcommittee to specify that a party must make the work-product showing of need and hardship in order to discover attorney-expert communications bearing on the opinions to be expressed by the expert. This requirement, for example, is set forth in the New Jersey rule, which protects from disclosure the collaborative process between attorney and expert. The expert is, in effect, treated as part of the lawyer's work product.

But the subcommittee became increasingly concerned that the proposal would make it impossible to ask an expert about certain matters that legitimately should be discoverable. Therefore, it has attempted to draft a rule that makes fine distinctions and protects, as work product, all attorney-expert communications other than those that address the opinions that the expert will express. The subcommittee, he said, has struggled with the distinction and found it difficult to draft. Accordingly, it would welcome any input that Standing Committee members might have about how far the protection of attorney-expert communications should extend.

A member stated that the approach embodied in the New Jersey rule is excellent and would save time and money. Under that rule, both sides enjoy the same protections. He noted that in all the cases he litigates, he seeks an agreement with his opponent to establish this very regime, *i.e.,* agreeing that expert-witness drafts and attorney-expert communications will not be discoverable. A party may inquire into whatever an expert witness actually did or did not do. But their draft reports and communications with attorneys regarding the development of their report and opinions are not discoverable.

A member predicted that if the rule does not protect attorney-expert communications, lawyers will simply opt out of it by agreement. The rule, moreover, must make the protection against discovery airtight. Otherwise, parties with means will continue to hire two sets of experts, one for consulting and one for testifying.

A member pointed out that if the committee were to limit what may be inquired into at trial, not just in discovery, the limits would have to be different in civil cases and criminal cases. A criminal defendant is entitled to ask an expert witness in a criminal case what the prosecutor has told the expert. That testimony simply cannot be limited, other than on

grounds of relevancy and privilege. Similarly, in a criminal trial, an expert's drafts and notes must be turned over to the defendants under 18 U.S.C. § 3500. Normally, civil discovery is broader than criminal discovery, but in this particular context, civil discovery would be narrower than criminal.

Judge Kravitz noted that the advisory committee had considered inserting language in the committee note to address preserving the discovery protections at trial. The assumption has been that matters protected by work product for purposes of discovery should also be protected for purposes of trial. The committee, though, does not address the matter in the text of the rule itself.

A member acknowledged that this is a difficult area to address in a rule, but argued that the contemplated changes are essential and should be pursued. He emphasized that attorney-expert communications need protection and reported that he tries to reach opt-out agreements with counsel in all cases. But, he said, counsel must be allowed to inquire into certain communications, such as: (1) what an expert witness had been told to do, or not to do; (2) what were the lawyer's instructions to the expert; and (3) what set of facts the expert was told to assume.

Judge Kravitz agreed that a party should always be able to inquire into what set of facts the expert was told by the lawyer to assume. He acknowledged that a rule that places certain matters out of bounds for discovery purposes will result in lawyers obtaining less information. Therefore, the committee must be confident that the compensating benefits of a proposed rule outweigh the limitations. The line that the draft rule draws, moreover, must be clear in order to avoid endless litigation. He added that the New Jersey lawyers had informed the subcommittee that they are perfectly capable of attacking opposing expert witnesses without having to discover their communications with lawyers.

Members agreed that a jury is entitled to know what instructions a lawyer has given an expert and what prompted the expert to use one approach rather than another. The jury should know whether a witness is a hired gun and draw whatever conclusions it can from that fact. One member argued strongly that discovery of some attorney-expert communications is essential and expressed skepticism that lawyers will favor changes in Rule 26 that limit their scope of inquiry. Judge Kravitz responded that lawyers of all kinds have told the committee that they favor a change in the rule along the lines proposed by the subcommittee. Among other things, they complain that they simply cannot afford to hire two sets of experts and are looking to the committee for relief.

A member noted that one fear about giving greater protection to attorney-expert communications is that lawyers will be prevented in the discovery process from uncovering abuses. But, he observed, lawyers do not learn about abuses now, even with all the cost and time now expended on discovery fights over communications.

A member stated that the rules in New Jersey and Massachusetts that protect attorney-expert communications apparently work very well and enjoy wide bar support. But it would be good to know whether other states follow similar models. There could be problems if the federal rules were to proceed in a direction sharply different from most of the states. An alternative approach might be to leave the current rule in place, but to add a sentence stating that nothing in this rule precludes a stipulation by the parties to the contrary.

A member argued for a complete ban on inquiry into attorney-expert communications, with one or two narrow exceptions along the lines discussed by the committee. Others agreed and suggested that an opponent should be able to ask an expert only such limited questions as who hired the expert, who paid the expert, and whether the expert had been paid to do any earlier work for the law firm.

A member added that the committee should be careful to make it clear that the rule addresses only discovery and that the situation at trial may be different. The opposition may not inquire into certain matters during the discovery process, but is not necessarily precluded from asking about them at trial.

4. Next Steps for the Advisory Committee

Judge Kravitz asked for a sense of the Standing Committee as to whether the advisory committee should continue with its efforts to draft amendments to Rule 26. In addition, he asked for the Standing Committee's advice on whether the rule should: (1) draw a fine line delineating which attorney-expert communications are discoverable and which are not; or (2) simply impose a complete ban on the discovery of attorney-expert communications.

The committee took a straw poll and agreed unanimously to encourage the advisory committee to continue working on amendments to Rule 26. On a second straw vote, it agreed, with one dissent, that the advisory committee should continue in its current direction on the proposed amendments. Judge Rosenthal observed that the debate had illustrated the eternal trade-off between clarity and nuance. The present rule, she noted, is very simple and requires the turnover of drafts and communications. It clearly needs refinement, but without a loss of clarity.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of December 12, 2007 (Agenda Item 7).

Amendments for Publication

FED. R. CRIM. P. 5, 12.3, and 21

Judge Tallman reported that in June 2007 the Standing Committee had approved for publication several rule amendments to implement the Crime Victims' Rights Act. Since that time, the advisory committee has continued to review the rules to determine whether additional amendments are needed. As a result of that review, it was now seeking approval to publish three more rule amendments dealing with victims' rights.

The change to FED. R. CRIM. P. 5 (initial appearance) would make it clear that a court must take the impact of the defendant's release on the safety of the victim into account in determining whether to detain or release the defendant.

The proposed amendment to FED. R. CRIM. P. 12.3 (notice of public-authority defense) would specify that a victim's address and phone number not be given automatically to a defendant who raises a public-authority defense. Rather, the defendant must make a showing of need before the court may release the information. The amendment would also give a court authority to fashion reasonable procedures to meet the defendant's need without risking danger to the victim. The amendment, Judge Tallman said, is a conforming change similar to the amendment that the committee has made to Rule 12.1 (notice of alibi defense), which will take effect on December 1, 2008.

The proposed amendment to Rule 21 (transfer for trial) would require a court to consider the convenience of victims, in addition to the convenience of parties and witnesses, in determining whether to transfer proceedings to another district.

Professor Beale explained that when the advisory committee had considered the original package of rule amendments to implement the Crime Victims' Rights Act, serious questions had been raised as to whether protections already specified in the Act should be repeated in the rules. She noted that this is a continuing and recurring policy question, *i.e.*, whether self-executing statutory provisions should be repeated in the rules. The issue, she said, is raised by all three proposed amendments.

Professor Beale noted that if a statutory protection is not picked up in the rules, advocates will argue that the courts are not doing all they can to protect victims. That

perception is unacceptable, she said, because one of the purposes of the framers of the Act was to make courts and lawyers more sensitive to the needs of victims. She noted, by way of example, that the Act specifies that a court must consider protection of victims when it sets bail for a defendant. Therefore, it can be argued that the proposed amendment to Rule 5 is superfluous. Nevertheless, repeating the statutory directive at the appropriate point in the rules underscores the Judiciary's commitment to protecting victims. The advisory committee, she said, has been attempting to tread a fine line by not repeating all the various provisions of the Crime Victims' Rights Act in the rules, but including some key, sensitive requirements.

With regard to the proposed amendment to FED. R. CRIM. P. 5, a member pointed out that the Bail Reform Act sets forth a number of factors, other than the right of a victim to be reasonably protected, that the court must consider in determining the release of the defendant. He questioned whether the proposed amendment tilts the playing field by specifying only this one factor – protection of the victim – in the rules to the exclusion of all the other statutory factors. Professor Beale responded that the amendment may arguably tilt the playing field a bit, but the committee could not repeat all the statutory factors in the rule. Again, making a single exception to protect victims is appropriate and demonstrates the concern of the courts to protect victims. Some members suggested language that might be inserted in the text to reflect that victims' rights are among several factors specified in the statute.

A member suggested leaving the rule text alone and simply mentioning a victim's rights in the committee note. But Professor Beale replied that it would be better to include the matter in the text of the rule, where it will have more impact.

A member observed that the proposed amendment to Rule 21 states that a court must consider the convenience of victims only when the defendant makes a motion to transfer. But the court should consider the convenience of victims in all cases, whether or not the defendant makes a motion. Professor Beale attributed the proposed language to the structure of the rule. The prosecutor initiates proceedings in the district in which the case will be prosecuted. Then the defendant moves to change the location. Judge Tallman suggested that the language could be changed to specify that the court consider the convenience of victims in considering a transfer.

Professor Beale raised the possibility of changing the language from "for the convenience of the parties, any victim, and the witnesses" to "after considering the convenience of the parties, any victim, and the witnesses, the court may . . . ." A member suggested expanding the rule to two sentences. Judge Rosenthal agreed that the language should be refined, and she suggested that the Standing Committee approve the amendment for publication subject to drafting changes by the chair and reporter of the advisory committee that take into account the comments of Standing Committee members.

A member asked what happens under proposed Rule 12.3 once a defendant makes the required showing of need for personal information about the victim. He asked whether the advisory committee had considered requiring that notice be provided to the victim before the court orders the government to turn over the personal information. Since the intent of the proposed amendment is to protect victims, they should be notified as to what is happening. Although prosecutors normally do notify victims of requests for information, it does not happen in every case. Others agreed that victims should be notified immediately when a request for information is first made.

Mr. Tenpas expressed concern that any amendment to the rules that would require the Department of Justice to notify victims might create liability for the Department if it failed to notify a victim in a particular case. A prosecutor's failure to follow a federal rule, as opposed to failure to follow an internal policy directive of the Department, might have implications for the government's or prosecutor's liability.

Professor Beale noted that the proposed amendments to Rule, 12.3 regarding the public-authority defense, track the amendments to Rule 12.1 (notice of alibi defense), which have already been approved and are due to take effect on December 1, 2008. Rule 12.1, as revised, does not contain a notice requirement of the kind the committee is now discussing regarding Rule 12.3. Judge Tallman observed, though, that the alibi defense is likely to arise more frequently than the public-authority defense. Even though it would be desirable to make the two rules parallel, it is too late to do anything about amending Rule 12.1 further before it takes effect.

Judge Rosenthal suggested that the committee monitor practice under the revised alibi defense rule once it takes effect. If it decides that a notice provision is appropriate, it could propose adding it to both rules at a later date. Judge Tallman agreed and emphasized that the advisory committee has viewed implementation of the Crime Victims' Rights Act as an ongoing, iterative process. It will continue to monitor experience under the Act and address any real problems as they arise.

Judge Tallman reported that victims' rights proponents have not been satisfied with the committee's pace or results to date in implementing the Act. Some apparently believe that the committee has delayed making rule changes. As a result, he said, Senator Kyl had introduced legislation to bypass the entire Rules Enabling Act process and enact by statute all the proposed rule changes drafted by victims' rights proponents. Judge Tallman emphasized that it would be far better to follow the Rules Enabling Act process.

Judge Rosenthal stated that there had been no further Congressional developments on the legislation, and there appeared to be no need for the committee to take hasty action. Nevertheless, she said, there continues to be a good deal of interest in Congress regarding

victims' rights. So if the committee is seen as not moving far enough or fast enough within the rules process, Congress may decide to proceed with further legislation.

Mr. Tenpas reported that the Department of Justice regularly receives expressions of Congressional dissatisfaction with actions that the Department takes in particular cases. He stated that victims' rights is an area of active monitoring by private groups and individuals with ready access to Congress.

Mr. Cecil reported that the Federal Judicial Center had undertaken a study of victims' rights implementation in the courts. Then the Government Accountability Office began a similar study, adopting the Center's research design. As a result, the Center has suspended its efforts until after the GAO files its report.

The Committee without objection by voice vote approved the amendments for publication, with the understanding that the advisory committee may modify the language of the amendments along the lines of the Standing Committee discussion.

Committee Membership for a Victims' Rights Advocate

Judge Tallman reported that the Chief Justice had received a request to add a crime victims' advocate as a permanent member of the Advisory Committee on Criminal Rules. The Chief Justice remanded the request to the Standing Committee, which in turn remanded it to the advisory committee.

The advisory committee, he said, had rejected the idea on the merits, emphasizing that its meetings and workings are all collaborative and open. The rules process is public, and victims' rights advocates are in fact heard. It would set a terrible precedent, he said, to appoint as a committee member a partisan advocate wedded to a particular viewpoint or group. The rule-making process is a collegial process, and partisan advocacy is inappropriate.

Several participants expressed strong agreement and noted that if the precedent were set, there would be unfortunate consequences for the other rules committees. They said that the advisory committees bend over backwards to consider all sides of issues and reach out to affected parties. Committee members, of course, may bring their particular experiences to the table, but the working reality is that each member puts justice and the rule-making process first.

A member observed that a criminal case traditionally has been viewed as a three-party proceeding involving the judge, the prosecutor, and defense counsel. But the Crime Victims' Rights Act, some victims' rights advocates claim, has transformed it into a four-party process involving the judge, the prosecutor, defense counsel, and the victim's

representative. Raising the victim to the status of a full party in each criminal case, he said, would represent a fundamental shift in the very structure of the criminal justice system and upset the careful balance established by the Constitution and federal statutes.

Several members agreed that a partisan seat should not be created on the advisory committee, but emphasized that the committee needs to make sure that the victims' rights community is fully informed and given full input into the process. That community might have a sense of greater responsiveness if the committee maximized the ability of victims' advocates to participate.

Judge Tallman stated that the advisory committee had agreed to do exactly that. Among other things, it had suggested that the Department of Justice meet with victims' groups on a regular basis. The committee also has placed crime victims' issues on its website, and it recently sent a letter to victims' groups seeking their input. The Federal Judicial Center, moreover, now includes victims' rights in the curriculum of its training programs for newly appointed judges, and it is working on a pocket guide for judges on the obligations imposed by the Act.

Mr. Ishida added that the former Judge Cassell, a leading victims' rights advocate, had thanked Judge Tallman for the advisory committee's outreach efforts and asked that they be continued. Mr. Rabiej elaborated that the advisory committee had sent a letter to 20 groups that had commented on, or expressed interest in, the committee's victims' rights amendments. It asked them to keep the committee informed of any specific examples of victims' rights being denied in court.

Mr. Tenpas stated that the Department of Justice has maintained regular contact with large numbers of victims' rights groups. He suggested that the Department and the advisory committee might share information in this area. The Department could give the committee a list of the victims' groups with which it has contact.

Judge Kravitz stated that the Advisory Committee on Civil Rules had asked organizations like the American Bar Association to send a liaison to its meetings. Along the same lines, he suggested, the Criminal Rules Committee might consider inviting victims' advocates to attend committee meetings.

Judge Rosenthal observed that the Standing Committee clearly appeared to be in agreement with the views of the advisory committee. She suggested that the request be treated as an action item, and the committee should inform the Chief Justice by letter that it will not ask him to appoint a victims' representative to be a member of the advisory or Standing Committee. She asked the advisory committee to draft a letter for the Chief Justice to be circulated to the Standing Committee for approval. The letter, she said,

should also point out that the rules committees will continue to monitor victims' rights issues and seek input and information from victims' rights groups.

Informational Items

Judge Tallman reported that the advisory committee was considering an amendment to FED. R. CRIM. P. 32(h) (notice of a court's possible departure from the sentencing guidelines) to specify what a sentencing judge must disclose to the defendant before imposing a sentence outside the guidelines. He noted that the Supreme Court recently had granted certiorari in a case that may shed additional light on the issue. As a result, the advisory committee had decided to put the amendment on hold pending the Court's decision.

Judge Tallman stated that he had appointed a subcommittee, chaired by Thomas McNamara, to consider proposed amendments to Rule 11 of the habeas corpus rules. The subcommittee had met twice and will report to the committee at the next meeting.

He reported that Professor Struve, reporter to the Advisory Committee on Appellate Rules, had addressed his advisory committee on the subject of indicative rulings. The criminal advisory committee, he said, was considering piggybacking on the proposed amendments to the Appellate Rules and the Civil Rules on this issue.

Judge Tallman briefly summarized recommendations pending before the advisory committee from the Federal Magistrate Judges Association to amend: (1) Rule 6 (grand jury) to permit the return of an indictment by video conference; (2) Rule 12 (pleadings and pretrial motions) to require a defendant to assert before trial any contention that the indictment fails to state a claim; (3) Rule 15 (depositions) to permit the deposition of a witness outside the presence of the defendant when it is impractical or impossible to depose the witness in the defendant's presence; and (4) Rules 32.1 (revoking or modifying probation or supervised release) and 46 (release from custody) to expressly authorize an arrest warrant or summons to revoke bail or supervised release.

A member pointed out a problem with a motion under FED. R. CRIM. P. Rule 29(c) (motion for a judgment of acquittal) being filed after trial. Judge Tallman reported that the advisory committee had abandoned its recent, controversial efforts to amend Rule 29 after discovering how seldom Rule 29 motions are made in the courts.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of December 1, 2007 (Agenda Item 8).

Informational Items

Judge Hinkle reported that the process of restyling the Federal Rules of Evidence is now underway. He explained that restyling of the rules had been deferred until after completion of the restyling of the appellate, criminal, and civil rules. He noted that there has been general agreement that the evidence rules should be changed as little as possible. Stability is more important for these rules than for other federal rules because lawyers use the evidence rules in the courtroom every day, and often do so on the fly. By the same token, however, a good argument can be made that the evidence rules, in particular, need restyling because they must be clear for lawyers.

Judge Hinkle reported that the advisory committee had decided that the clarity of the rules could be improved by restyling, and it decided to follow essentially the same restyling process used by the Advisory Committee on Civil Rules to restyle the civil rules. To begin the process, the subcommittee asked Professor Joseph Kimble, consultant to the Style Subcommittee, to draft for its review a few restyled evidence rules. The committee concluded that the product was a marked improvement over the current rules. It then divided the body of rules into three batches and expects to have the first batch (Rules 101 to 415) ready for review by the Standing Committee at its June 2008 meeting. By that time, the restyled rules will have been well vetted by the advisory committee and the Style Subcommittee. Under the current timetable, the restyled evidence rules would take effect on December 1, 2011.

Judge Hinkle reported that the advisory committee was reviewing Rule 804(b)(3) (hearsay exceptions), dealing with a declaration against penal interest by a declarant who is unavailable. When Congress enacted the rule, he said, it specified that the defendant must provide corroborating circumstances for an exculpatory declaration. But the prosecution need not show corroborating circumstances for an incriminating declaration. The prosecution, however, must still meet constitutional confrontation-clause requirements, which are similar but different. The constitutional requirements are not set forth in the rule, so it does not state accurately what the law is.

Several years ago the Standing Committee had approved an amendment to Rule 804 on this issue and forwarded it to the Supreme Court for issuance. But the Court decided the *Crawford* case and remanded the proposed amendment for further consideration. The advisory committee has held the amendment in abeyance in order to monitor case law

developments under *Crawford*. It now plans to present the Standing Committee at its June 2008 meeting with a recommendation – either to amend Rule 804 or not.

Professor Capra reported that the case law appears to be settling on the principle that any hearsay statement that is admissible is non-testimonial under *Crawford*, and therefore constitutionally admissible. If so, there really is no *Crawford* problem with the rules, because they do not allow admission of hearsay statements under circumstances that offend the Constitution.

Professor Capra also reported that the Supreme Court had just granted certiorari in *California v. Giles*, involving the forfeiture of hearsay exceptions. The issue in that case is whether the defendant forfeited a hearsay exception by allegedly killing the declarant. If the Court affirms, there could be a conflict between the Confrontation Clause and the provision in Rule 804 dealing with forfeiture of exceptions.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz reported that the rules committees have been asked on several occasions to consider rules on secrecy, protective orders, and sealing. Recently the chief judge of the Seventh Circuit expressed concern to the Judicial Conference about the practice of some district courts sealing entire cases, and it asked the Conference to study the matter. The Conference referred the matter originally to the Court Administration and Case Management Committee. As a result of that committee's efforts, the Conference corrected a situation in which the CM/ECF electronic dockets in some district courts had shown that sealed cases did not exist.

But the correction did not address the policy issue of whether an entire case should ever be sealed. The Executive Committee of the Judicial Conference has now referred to the Standing Committee the issue of whether, and when, the sealing of cases is appropriate. The Standing Committee appointed a subcommittee, chaired by Judge Hartz, with representatives of each advisory committee as members, and Professors Coquillette and Marcus as its reporters. The subcommittee intends to seek input from the Department of Justice and from clerks of court.

0 The subcommittee held its first meeting two days ago. Its first order of business was to decide on the proper scope of its inquiry. It concluded that the scope should be narrow and that its inquiry should only address the sealing of entire cases, not court orders that seal particular motions or record materials.

Judge Hartz pointed out that there is a definitional question as to what constitutes an entire case. He asked, for example, whether it would cover: (1) a sealed application for a

wiretap; (2) a sealed adversary proceeding within the context of a larger bankruptcy case; or (3) a sealed motion or application that has been assigned its own miscellaneous case number. He also noted that some cases are sealed for a period of time and then re-opened.

He noted that the subcommittee had agreed to seek further data on sealed cases from the Federal Judicial Center to guide its inquiry. Tim Reagan of the Center has agreed to examine data from 2006 cases and will provide preliminary information before the next committee meeting.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Professor Struve reported that Judge Kravitz had assumed chairmanship of the Advisory Committee on Civil Rules and that Judge Huff has replaced him as chair of the Time-Computation Subcommittee. She thanked Judge Kravitz for his leadership of the project, and Judge Huff for taking over the work.

Professor Struve explained that the centerpiece of the time-computation project is a change in the method of counting time. The mandate is to count all days unless the final day of an event falls on a weekend or holiday. The subcommittee, she said, had produced a template rule that each advisory committee adopted, and proposed rule amendments were published for comment in August 2007. The responses from the public to date, she said, have been sparse, but rigorous. The scheduled hearings on the amendments had been cancelled, and the comment period ends on February 15, 2008. At that time, the subcommittee will consider the comments and refer its views to the advisory committees.

Professor Struve summarized the comments received to date. She reported that Chief Judge Easterbrook had expressed strong support for the project, but suggested that the committee take the opportunity to abolish the "three-day rule," noting that electronic service is rendering it obsolete. Professor Struve observed that the advisory committees have indeed been considering the "three-day rule" for the last decade. Judge Kravitz added that the subcommittee had made a conscious decision that the time was not yet ripe to abolish the "three-day rule," but the matter will be addressed again in the future.

Professor Struve reported that the Committee on Civil Litigation of the Eastern District of New York strongly opposed the time-computation project, arguing that the costs of change will exceed the benefits. The committee said that the current time-counting system is working fine, and changing it will cause problems. In particular, it highlighted the problem of computing statutory deadlines and offered some suggestions on how to tweak the proposed rules, if the project proceeds.

She noted that the advisory committees had been asked to identify the most important statutory deadlines in their respective areas that Congress should be asked to adjust in order to conform various statutory time limits to the new time-computation rules. She emphasized that it will be essential to coordinate the rules changes with the legislation. In addition, local courts of court will have to be adjusted to comport with new national time-computation rules.

Professor Struve explained that the advisory committees at their spring meetings will consider the public comments and review their list of statutory deadlines in order to recommend to the Standing Committee which statutory deadlines should be adjusted. They will submit their recommendations for approval by the Standing Committee at its June 2008 meeting.

Mr. Tenpas reported that the Department of Justice was studying time-computation issues. He noted that passions are strong in every direction, as officials have widely divergent opinions. The Department considers the likelihood that Congress will act on statutory deadlines to be remote. He stated that he did not know what position the Department ultimately will take on the proposed time-computation changes, but the Standing Committee should know that many in the Department believe that the proposals are a bad idea. The Department should have a new Deputy Attorney General and other top leaders shortly, and at that time it will be able to develop Department-wide positions.

REPORT ON STANDING ORDERS

Judge Rosenthal reported that Professor Capra had been asked to examine the use of standing orders in the courts. As a result, he had drafted an excellent paper on the subject and presented it at the June 2007 committee meeting. In addition, the committee has been working with Professor Capra to develop a survey asking district judges and bankruptcy judges for input in developing guidelines that would identify for the courts the matters that are best addressed in local rules and those that should be addressed in standing orders. The courts, moreover, would be encouraged to make standing orders more accessible to the bar. The proposed survey, she said, is now being reviewed by the Administrative Office before being sent to the district and bankruptcy courts.

PANEL DISCUSSION ON *BELL ATLANTIC V. TWOMBLY* AND NOTICE PLEADING

Professor Burbank moderated the discussion on the impact of the Supreme Court's decision in *Bell Atlantic v. Twombly,* 127 S.Ct. 1955 (2007), on notice pleading. The panel consisted of Judge Scirica, Ms. Cabraser, and Messrs. Joseph and Bernick.

Professor Burbank introduced the topic by addressing: (1) whether *Twombly* represents a repudiation of the philosophy underlying the original 1938 Federal Rules of Civil Procedure; (2) the scope of *Twombly*'s application and whether it truly represents a major change in practice; (3) the extent to which *Twombly* affects interpretations of FED. R. CIV. P. 8 and 12 on heightened pleading; and (4) the impact of *Twombly* on the rule-making process and on access to the courts.

Professor Burbank noted that the drafters of the Federal Rules of Civil Procedure rejected the old common law and code pleading system in large part because it had blocked access to the courts by imposing technical and artificial distinctions and by preventing parties from obtaining the facts that they needed to pursue their claims. The Founders believed that pleading is a feckless means to discover which matters are in dispute and can lead to inefficient trials. Therefore, they decided that pleadings should play a lesser role under the federal rules, and greater emphasis should be given to judicial discovery, summary judgment, and the pretrial conference.

But fact pleading died hard. As late as 1953 the Judicial Conference lobbied for restoring the pleading requirements. Then came the litigation explosion of the 1960s, and it became clear that the Founders had overestimated discovery as a means of narrowing issues and had underestimated the value of pleading. He added that some have suggested that *Twombly* applies only to Sherman Act or antitrust conspiracy cases. But he said that his reading of the thousands of cases that have cited *Twombly* demonstrates that that is simply not the case.

Mr. Joseph reported that in just six months, *Twombly* has already been cited more than 3,000 times. It is being applied in all types of cases and has had a major impact. The courts are addressing and citing *Twombly* in every case, and it has replaced the prior standard laid down in *Conley v. Gibson*. He noted that the plausibility pleading standard erected by *Twombly* – that the plaintiff must plead a factual predicate to suggest plausibility – represents a real change. The question remains, though, whether *Twombly* applies outside Sherman Act cases. One reading is that the decision may apply in complicated cases, but not in simple ones. In simple cases, it appears that the courts after *Twombly* have been sticking to notice pleading.

Thus, no one really knows for sure what FED. R. CIV. P. 8 (general rules of pleading) means any longer. The text of the rule may have meant one thing for 50 years

before *Twombly,* but now it may mean something different. Civil complaints may now be dismissed by the district courts for being too short. We do know from *Twombly* that conspiracy claims, such as civil RICO and civil rights claims, are subject to a fact-based requirement that a plaintiff plead facts sufficient to show plausibility. Importantly, the Second Circuit in *Iqbal v. Hasty.* 490 F.3d 143 (2d Cir. 2007), found in *Twombly* a flexible plausibility standard under which heightened pleading is required where necessary to establish plausibility.

Mr. Bernick agreed that *Twombly* is not confined to antitrust claims. The Supreme Court repudiated *Conley*, but it did not have to retire *Conley* in order to clarify the standard for pleading only in antitrust cases. Clearly the Court's intent was to announce a broader application to all complex, non-routine cases. Now the federal courts have to figure it out.

Professor Burbank pointed out that the first sentence of *Twombly* explicitly states that: "We granted certiorari to address the pleading standards in antitrust conspiracy cases." A member added that the Court decided *Erickson* right after *Twombly* and made it clear in that case that notice pleading still prevails in simple cases. Therefore, *Erickson* needs to be integrated into *Twombly*. In fact, it may be that *Twombly* is being over-read in the vast majority of cases where the defendant can figure out from the complaint what is being alleged by the plaintiff. *Erickson* was a quick per curiam, issued just three weeks after *Twombly,* and it might have been a vehicle for the Court to send a prompt message that *Twombly* was not intended to abolish notice pleading. Another member disagreed, though, arguing that *Erickson* means very little and suggested that the appellate decision in that case was wrong.

Professor Burbank noted that illustrative patent infringement form appended to the civil rules (former Form 16, renumbered as Form 18 in 2007) is an example of pure notice pleading. He asked whether the advisory committee, in the light of *Twombly*, should discard the forms that illustrate pleading. Mr. Joseph added that the illustrative civil rules 2form for pleading a negligence case is also arguably inadequate under *Twombly*.

Professor Coquillette observed that lawyers have been shaped both by the common law rules of pleading and equitable rules of pleading. One explanation of *Twombly,* he said, may be that it seeks to foster a system that looks at the context of a claim and gives a judge discretion, following the tradition of equity, rather than common law.

Judge Scirica discussed the factual specificity required by *Twombly* and its relation to the goal of providing sufficient notice to the defendant. He said that the problem with *Conley v. Gibson* was not with what it said, but with how it had been interpreted to require judges to speculate about unspecified and undisclosed facts. That approach was not helpful, and it was beneficial for the Supreme Court to supersede it in *Twombly*.

He pointed out that the Court in *Twombly* noted that FED. R. CIV. P. 8 requires a plaintiff to provide fair notice to the defendant. Plausibility, though, is not mentioned in the general standards of the rule. Many courts have looked to the fair notice aspect of *Twombly* as the key element, and they are correct. Notice, though, is different from plausibility. The Second Circuit decision in *Iqbal* was clearly based on context, and it added the concept of context to that of notice. The resulting "flexible plausibility" standard means the degree of factual specificity necessary to render a claim "plausible" in context. For example, a mere allegation of conspiracy does not provide sufficient notice, but a mere allegation of negligence does.

Judge Scirica noted that there is reason to ask whether *Twombly* conflates the purposes of FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim) and FED. R. CIV. P. 12(e) (motion for a more definite statement). The plausibility standard could be viewed as a standard more relevant to determining a motion for a more definite statement, rather than a motion to dismiss for failure to state a claim.

Professor Burbank observed that the Court in *Twombly* took pains to state that it was not requiring that "specific facts" be pleaded. But, he asked, what is the difference between "specific facts," which *Twombly* said were not required, and the kinds of facts that will now be required. Judge Scirica responded that the only way to make sense of the matter is to focus on the notice requirement. Given the context of a case, what is needed for the plaintiff to give fair notice to the defendant?

Professor Burbank added that "notice" is only supposed to be notice sufficient to permit the defendant to file an answer accepting or denying the allegations. That is not much of a requirement, as the illustrative forms suggest. It appears, therefore, that *Twombly* may be changing the nature of "notice." Judge Scirica agreed and emphasized that each class of cases will have to be treated differently based on context. The plausibility requirement will lead to inconsistent opinions, because different judges will see "plausibility" differently. Professor Burbank lamented the resulting lack of uniformity under the federal rules.

Mr. Joseph noted that since *Twombly* apparently offers the possibility of a dismissal under FED. R. CIV. P. 12(b)(6), practitioners are likely not to bother with motions for a more definite statement.

A participant observed that before *Twombly*, practitioners largely had been of the view that filing a motion to dismiss under FED. R. CIV. P. 12(b)(6) is a waste of time because judges usually just refer the movant to discovery. The only recognized exceptions are for those claims, such as defamation and conspiracy, where the rule requires pleading additional facts and a plaintiff cannot rest on a broad allegation.

A member reported that practitioners indeed are now bringing more motions to dismiss after *Twombly*. But, even after *Twombly*, courts are still granting leave to amend after some discovery. Courts may also grant motions to dismiss without prejudice, allowing plaintiffs to plead more facts and refile their complaint. Ms. Cabraser agreed that motions to dismiss have been more common since *Twombly*, and Mr. Joseph agreed that *Twombly* actually argues in favor of granting liberal leave to amend.

Mr. Cecil reported that the Federal Judicial Center was gathering additional data on motions to dismiss in order to assist the committee's future deliberations. The Center, he said, has data on cases going back to 1975 and it can produce multi-year case comparisons. The Center will await the committee's direction as to the right time to gather and analyze the information.

Judge Rosenthal observed that it is difficult to reconcile *Twombly* with the language of FED. R. CIV. P. 8. Under *Twombly*, FED. R. CIV. P. 12(b)(6) and 12(e) are really no longer separate, and the current rule structure no longer makes sense. She noted, too, that the illustrative forms include a bare-bones patent infringement complaint that is sufficient under the rules. Therefore, if everything now depends on context, it may no longer be safe to have any illustrative forms for pleading. Thus, the advisory committee may wish to eliminate some of the illustrative forms because *Twombly* requires consideration of context. But Professor Burbank warned that the bar would be strongly opposed to that action. He suggested, as a practical matter, that the committee cannot advise lawyers that it cannot provide them with any assurance that any particular form of pleading will be sufficient.

Mr. Bernick discussed whether it was appropriate for the Supreme Court to reinterpret FED. R. CIV. P. 8 the way it did, considering its admonition that rules be amended only through the Rules Enabling Act process. He stated that the *Twombly* decision was designed to have an impact on civil practice, and it is clearly not confined to antitrust claims. Rather, it announced new guidance on pleading standards generally, revolving around "plausibility." He said that he did not see any Rules Enabling Act problem with the case. By way of analogy, the Court's decision in *Daubert* was also major in its scope. The Court in that case, too, was interpreting existing rules. A new rule was not strictly necessary, but the Federal Rules of Evidence were in fact amended through the Rules Enabling Act process to make them consistent with the Court's holding.

Mr. Bernick said that plausibility does not mean just "particularity." Nor is particularity alone sufficient. A complaint may be highly particular, but still not plausible. Plausibility also does not mean a prediction of success. Nor does it require an inquiry only as to notice. The simple, but ultimate inquiry that must be made is into the plaintiff's entitlement to relief and whether there is a viable theory of the case. Plausibility involves notice of whether the material or operative facts demonstrate that there may be a possibility

of relief. *Twombly* requires a plaintiff to give notice not just of what its claim is, but also notice of why it believes that it is entitled to relief.

Thus, Mr. Bernick said, *Twombly* sets up a gate-keeping function that will determine who gets access to the court. It requires a court to exercise a more thorough gate-keeping function early in a case, especially in complex cases. And its inquiry must focus on the total context of each case. Mr. Bernick warned, though, that abolition of the illustrative forms could wreak havoc. In many cases they are appropriate, although they are never used in antitrust cases.

Professor Burbank asked about cases other than complex antitrust or patent cases, such as employment discrimination cases. The participants suggested that the impact of *Twombly* on those cases is largely left up in the air for the courts to work out.

Professor Burbank noted that Justice Souter said in *Ortiz v. Fibreboard Corp.* that the Supreme Court is bound by the understanding of a federal rule as it was understood when adopted. He pointed out that *Twombly* may be inconsistent with that admonition because the discovery rules have changed enormously since Rule 8 was first promulgated. Mr. Bernick added that the discovery process has become more burdensome over the years, and heightened pleading standards may be attractive.

A participant observed that it is useful to look at *Twombly* as a policy-based decision by the Court. In some cases the cost and burden of discovery are so great that the court must devote greater attention to the case at the outset. In simple cases, by contrast, discovery is not so great a burden, and traditional notice pleading may still work.

Ms. Cabraser stated that she represents plaintiffs in her practice. She reported that her office was roiled by *Twombly* because it has great potential implications for access to the courts. The plaintiff's antitrust group in her office is seeking additional guidance in pleading following *Twombly*. Clearly, an antitrust conspiracy claim now requires that plaintiffs plead more facts, but it is difficult to do properly in light of FED. R. CIV. P. 11 (representations to the court and sanctions). Plaintiffs' counsel are confronted with a dilemma because they may have to add facts to their complaints to meet the *Twombly* standard, but the pertinent facts may not be available or are not clear.

The opinion has created a tension not intended by the Court. Lawyers for plaintiffs used to be able to include assertions in a pleading, even though they could not prove them at that point. But *Twombly* may now require plaintiffs to do so in order to establish "plausibility." So lawyers may now face Rule 11 complications if they plead facts that they are not sure they can prove. The bottom line is that they will have to work harder and prepare longer complaints with more information.

Ms. Cabraser said that *Twombly* has done nothing to relieve the burden on the courts. To the contrary, it has imposed great additional burdens on the courts. There is an obvious desire in *Twombly* to set up a filtering mechanism to control the costs of discovery in complex cases. But the decision has imposed a burden on district courts to make subjective merits decisions about cases at their very outset. Plaintiffs must now take greater care to describe the who, what, and when of their cases, or run the risk of having their complaint dismissed. They will have to demonstrate the merits of their claims up front in order to be entitled to discovery. The result may be that litigation will no longer be a staged process, but a one-time bang. The big event will be for a plaintiff to prove its entitlement to discovery. It will have one shot at presenting and improving its case. The essence is that *Twombly* represents not an abrogation of Rule 8, but a refocus of the rule to create a single defining event at the outset of a case when the court must decide whether to allow the case to proceed.

She said that this departure from the rules is a big mistake. She noted that FED. R. CIV. P. 8 (general rules of pleading) and 9 (pleading special matters) have been anchors in federal civil practice. But now a higher burden will be placed on plaintiffs in more complex cases. The basic concern is that the ultimate triers of fact will be replaced by judges at the pretrial stage, and the consequences of a judge being wrong are great.

Ms. Cabraser stated that she does not understand the notion that the burden of discovery in complex cases is so great that there must be a more searching review at the outset of a case. Discovery, she said, is also expensive for plaintiffs. It is simply not a good approach to focus on reducing the costs of discovery by prejudging the plausibility of each plaintiff's case. As a result, landmark cases now will be less likely to be filed and access to the courts will be denied. Only routine, sure-thing cases are likely to be brought. She noted that plaintiffs' lawyers are not always in a position to gather additional facts without conducting some discovery. They may be able to plead "where" and "when," but it can be very difficult for them to plead "why."

She noted that human behavior often is very implausible. So "plausibility" is a very unreliable standard. There are many examples of allegations that appeared to be ridiculous on their face that have turned out to be true. In essence, people's behavior is sometimes not rational. Truth, not plausibility, is what is important.

Ms. Cabraser added that one hopes that judges will remember the context of *Twombly* and allow some discovery and amendment of pleadings. If they do, *Twombly* might work without a rule change as a function of appropriate judicial development. Some facts that a court may wish to see in a complaint cannot initially be there under Rule 11 because the plaintiff is not yet sure that he or she can prove them. Certainly, she said, we are now seeing a revival of motions to dismiss. We may also see amended complaint after amended complaint in complex cases.

Professor Burbank reported having attended an Oxford conference on class actions, where the discussion focused on the fact that just as the United States is trying to move away from class actions and rely more on public enforcement of rights, many European countries are moving in precisely the opposite direction. They are trying to de-emphasize public enforcement and re-invigorate use of the courts, which has not been their tradition. He asked what alternatives people will have if under *Twombly* it becomes difficult for them to access the courts to enforce rights that public agencies fail to enforce.

A member stated that when he first read *Twombly*, his first thought was that Rule 8 may now be misleading. He noted that lawyers may not read or debate *Twombly*, but they certainly will read the rule. *Twombly* imposed a heightened pleading standard that is not set forth in the rule. A plaintiff may believe that it has complied with Rule 8, only to have its complaint dismissed. Therefore, the committee needs to consider amending the rule.

Professor Burbank advised against amending the rule soon. He recommended that the advisory committee await case law development under *Twombly*. He minimized the concern about lawyers being misled, arguing that any competent lawyer should know about *Twombly*, which is in effect an amendment to Rule 8. By analogy, he added, the principles of res judicata are not in the rules, but any lawyer should know what they are. Practitioners will figure it all out, even though it is not set forth in the text of the rule. Mr. Bernick agreed that lawyers are aware of *Twombly*, but he cautioned that they may not be fully aware of the case law development in its wake.

Judge Scirica stated that another reason for the committee to postpone action is that the Supreme Court is likely to render another pleading decision in the near future. Mr. Joseph agreed, but reiterated that there is a problem now because the *Twombly* rule is different from the text of Rule 8. Yet, technically, all that the Supreme Court did in *Twombly* was to reinterpret the words of Rule 8. At some point, he said, the committee may wish to amend the rule, but not immediately.

Judge Kravitz stated that he agreed with the panel members that the committee should not act too soon. He noted that the committee has been keeping a watchful eye on developments and will continue to do so. The only possible area for action at this time, he suggested, might be to look at the illustrative forms because they may no longer be good models for reflecting the current state of the law.

A member stated that he was not convinced that waiting is the best course of action and suggested that the committee at least stimulate debate. He said that consideration needs to be given to the impact of *Twombly* on small cases, including prisoner cases. Accordingly, the committee should see in *Twombly* an invitation by the Supreme Court to start thinking about these matters.

Judge Kravitz said that the advisory committee had been thinking about pleading before *Twombly*, and it would continue to monitor the case law and discuss the issues at future meetings. But it would be premature to draft proposed amendments and initiate the formal rule-making process. He observed that if the committee knew exactly what *Twombly* meant, it would be easier to decide whether the current situation demands rule changes.

Several members agreed that the committee should not jump in before getting more guidance from the case law. But it was suggested that the committee might identify the rules that might be impacted by *Twombly* and start thinking about areas where there might be a need for change. The committee could then prepare alternatives in anticipation of the day when further guidance comes.

Judge Kravitz agreed that the advisory committee could examine the types of cases where *Twombly* is applicable. The committee, for example, might want to know whether the heightened pleading requirement of FED. R. CIV. P. Rule 9(b) (pleading fraud or mistake) has worked well or not, and whether conspiracy and other kinds of cases should be added to Rule 9(b). Perhaps FED. R. CIV. P. 12(e) (motion for a more definite statement) should also be examined. The committee would have to decide whether to begin that effort now, or wait until work has been completed on the proposed amendments to Rules 26 and 56.

Several participants recommended that the committee consider beginning work now on improving the forms and observed that pro se litigants rely heavily on them. Judge Kravitz responded, though, that *Erickson* makes clear that *Twombly* does not impact pleading standards in pro se cases and may not apply to pro se cases at all. Judge Rosenthal added that *Twombly* may affect qualified immunity cases, which affect pro se litigants. One of the areas where requests for amended pleadings are most common are qualified immunity and municipal cases. Accordingly, some of the most complicated pleading and proof requirements do affect pro se cases. A member added that many district courts have developed their own local forms for pro se litigants and prisoners that require considerably more detail than the national forms.

A member observed that pleading had raised difficult issues long before *Twombly* and suggested that it might be useful to conduct a forum to discuss pleading in employment discrimination cases. The member agreed that it might be good to start now on research, even if it is not the right time for the advisory committee to take up the issue.

Judge Kravitz agreed that the advisory committee should think about possible research, confer with the Federal Judicial Center, and consider which rules might be affected by *Twombly*. The Supreme Court, he said, may provide further guidance in upcoming decisions. He added that it is likely that the bar will ask the committee to provide clearer guidance in the wake of *Twombly*.

Judge Rosenthal thanked the panel for sharing their thoughts on *Twombly* and its implications for rule-making. She emphasized that the committee's decision to hold the panel discussion did not suggest that it was proposing to launch large-scale rule-making effort on this topic. She added, though, that the advisory committee might begin laying the groundwork for potential future amendments.

CLOSING REMARKS AND NEXT COMMITTEE MEETING

Judge Rosenthal thanked Judge Teilborg, Mr. Maledon, and Professor Meltzer for their superb work on the Style Subcommittee. She also thanked Messrs. McCabe, Rabiej, Ishida, and Barr of the Administrative Office for their work in supporting the committee and arranging for another seamless meeting. She added that special recognition needs to be given to the Federal Judicial Center for its highly professional research in support of the committee's mission. Finally, she thanked Mr. Spaniol for his continuing, wise advice to the committee and his work with the Style Subcommittee.

The next meeting of the committee was set for June 9-10, 2008, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

3A.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May 9, 2008

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty-nine bills were introduced in the 110th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters.

Protective Orders

On December 11, 2007, Senator Herb Kohl (D-WI) introduced the "Sunshine in Litigation Act of 2007" (S. 2449, 110th Cong., 1st Sess.), which is similar to legislation that has been introduced regularly since 1991. S. 2449 provides, among other things, that before a judge enters a protective order under Civil Rule 26(c), the judge must make findings of fact that the discovery sought is not relevant for the protection of public health or safety or, if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information and the protective order is narrowly drawn to protect only the privacy interest asserted. The bill would apply to protective orders sought by motion as well as agreed to by stipulation.

On March 6, 2008, the Senate Judiciary Committee adopted a substitute version of S. 2449 and then reported it favorably by a vote of 12 to 6. The substitute amendment added two provisions to the original bill: (1) there is a rebuttable presumption that the interest in protecting a person's financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information. On April 23, 2008, Representative Robert Wexler (D-FL) introduced H.R. 5884 ("Sunshine in Litigation Act of 2008," 110th Cong., 2nd Sess.), which is virtually identical to S. 2449, as passed by the Senate Judiciary Committee. There has been no further action on the legislation.

On March 4, 2008, Judge Rosenthal, on behalf of the Standing Committee and with the concurrence of the Executive Committee, sent a letter to the Senate Judiciary Committee expressing strong concerns with S. 2449, stating that "the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more

difficult to protect important privacy interests and would make civil litigation more expensive, more burdensome, and less accessible." (See attached.) The Department of Justice also wrote a letter to the Judiciary Committee to share its concerns with the bill. (See attached.)

Cameras in the Courtroom

On January 22, 2007, Senator Charles Grassley (R-IA) introduced the "Sunshine in the Courtroom Act of 2007" (S. 352, 110th Cong., 1st Sess.), which provides discretion to the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings over which he or she presides. This aspect of S. 352 is identical to H.R. 2128 and similar to legislation approved by the Senate Judiciary Committee in the last Congress. On March 6, 2008, the Senate Judiciary Committee approved S. 352 by a vote of 10-8 after adopting several amendments to the bill, including the first two sets of amendments adopted by the House Judiciary Committee (described below). New amendments adopted include: (1) requiring the Judicial Conference to promulgate mandatory guidelines on shielding certain witnesses from camera coverage, including crime victims, families of crime victims, cooperating witnesses, undercover law enforcement officers, witnesses relating to witness relocation and protection, or minors under the age of 18; and (2) specifying that nothing in the bill limits the inherent authority of a court to protect witnesses, preserve the decorum and integrity of the legal process, or protect the safety of an individual. An amendment to remove the district courts from the legislation was defeated by a tie vote of 9-9.

On May 3, 2007, Representative Steve Chabot (R-OH) introduced H.R. 2128, the "Sunshine in the Courtroom Act of 2007" (110th Cong., 1st Sess.). At the House Judiciary Committee markup session on October 24, 2007, three sets of amendments were adopted by voice vote.

The first set of amendments: (1) barred interlocutory appeals of decisions to permit, deny, or terminate electronic media coverage; (2) expanded the current bar of "televising" jurors to include the other forms of electronic media coverage identified elsewhere in the bill; and (3) barred electronic media coverage of the jury selection process. The second set of amendments gave the presiding judge "discretion to promulgate rules and disciplinary measures for the courtroom use of any form of media or media equipment and the acquisition or distribution of any of the images or sounds obtained in the courtroom." They also gave the presiding judge the discretion to require written acknowledgment of the rules by anyone before being allowed to acquire any images or sounds from the courtroom. The third set of amendments deleted from the bill the description of any guidelines promulgated by the Judicial Conference as being "advisory" and struck the language indicating that presiding judges may, "at the discretion of that judge," refer to the Conference guidelines. The House Judiciary Committee approved the legislation, as amended, by a vote of 17 to 11.

In 2007, Secretary Duff sent letters to the House and Senate Judiciary Committees on behalf of the Judicial Conference strongly opposing S. 352 and H.R. 2128. (See attached.) The

Judicial Conference has strongly opposed cameras in the trial courts (see, e.g., JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) (The Second and Ninth Circuits allow broadcast coverage of their proceedings, if approved by individual panels.) There is no provision governing televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings.

Bail Bonds

On May 10, 2007, Representative Robert Wexler (D-FL) introduced the "Bail Bond Fairness Act of 2007" (H.R. 2286, 110th Cong., 1st Sess.). The bill is similar to legislation introduced in the 108th Congress and several previous Congressional sessions. Among other things, H.R. 2286 amends Criminal Rule 46(f)(1) by limiting the authority of a court to declare bail forfeited. (Criminal Rule 46(f)(1) provides that the court must declare bail forfeited if a person breached a condition of the bail bond.) H.R. 2286 amends the rule to limit the court's authority to declare bail forfeited only when the person actually fails to appear physically before a court as ordered, and not when the person violates some other collateral condition of release. The House passed the bill by voice vote on June 26, 2007.

Secretary Duff recently sent a letter to the Senate Judiciary Committee expressing the Judicial Conference's opposition to H.R. 2286. (See attached.) There has been no further action on the legislation.

Evidence Rule 502

On December 11, 2007, Senator Patrick Leahy (D-VT) introduced legislation to enact proposed Evidence Rule 502 on waiver of attorney-client privilege and work-product protection (S. 2450, 110th Cong., 1st Sess.), which is identical to the proposed rule approved by the Judicial Conference at its September 2007 session. On February 27, 2008, the Senate approved by unanimous consent without amendment S. 2450. There has been no further action on the legislation.

Other Developments of Interest

Crime Victims' Representative on Rules Committee. On March 24, 2008, Director Duff sent a letter to Professor Douglas Beloof regarding his proposal to appoint a crime victims' rights representative as a permanent member of the Criminal Rules Committee. Director Duff advised Professor Beloof that the Chief Justice had decided against appointing a victims' rights representative to the advisory committee. The Chief Justice, Director Duff wrote, shares the

Rules Committees' concerns that "it is inadvisable to add representatives of interest or advocacy groups as permanent members of rules committees." (See attached.)

On June 29, 2007, Senator Kyl introduced the "Crime Victims' Rights Act of 2007" (S. 1749, 110th Cong., 2nd Sess.). The bill would amend 33 Criminal Rules and create two new rules that would explicitly apply the Crime Victims' Rights Act to many court proceedings and procedures. The legislation also expresses a sense of Congress that the "Chief Justice . . . should designate not fewer than 1 member on each of the Committee on Rules of Practice and Procedure and the Advisory Committee on Criminal Rules for the purpose of ensuring that the rights and standing of crime victims are accounted for in the Federal criminal justice system." There has been no further action on the bill.

James N. Ishida

Attachments

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

March 4, 2008

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I write to advise you of the concerns of the Judicial Conference's Committee on Rules of Practice and Procedure about the "Sunshine in Litigation Act of 2007" (S. 2449), which was introduced on December 11, 2007 and is now pending Senate Judiciary Committee consideration. The Committee on Rules of Practice and Procedure has carefully and thoroughly studied the bill's proposed requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure and for issuing orders approving settlements with confidentiality provisions. As a result of this work, the Rules Committee concluded that the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more difficult to protect important privacy interests and would make civil litigation more expensive, more burdensome, and less accessible.

Discovery Protective Orders

S. 2449 would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c) of the Federal Rules of Civil Procedure, to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to S. 2449, have been introduced regularly since 1991. Under the Rules Enabling Act, 28 U.S.C. § 2071-2077, the Rules Committee studied Rule 26(c) to inform itself about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committee carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committee consistently concluded that provisions affecting Rule 26(c), similar to those sought in S. 2449, were not warranted and would adversely affect the administration of justice. Based on lengthy and thorough examination of the issues, the Committee concluded that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

The Empirical Data Shows No Need for the Legislation

In the early 1990s, the Committee began studying pending bills requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant issues about the potential for revealing confidential information that could endanger privacy interests and increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Committee concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committee asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep from the public information about public safety or health hazards. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil

cases. Most of the requests are made by motion, which courts carefully review and deny or modify a substantial proportion; about one-quarter of the requests are made by party stipulations that courts usually accept.

The empirical study showed that discovery protective orders entered in most cases do not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. About half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. Only half of the 398 cases involved a protective order restricting disclosure of discovery materials. Of the cases in which a protective order was entered restricting access to discovery materials, a little more than 50% were civil rights and contract cases and about 9% were personal injury cases. In the cases in which a protective order is entered restricting parties from disclosing discovery material, most are not personal injury cases in which public health and safety issues are most likely to arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards.

Other Information Shows No Need for the Legislation

The Committee also studied the examples commonly cited as illustrations of the need for legislation such as S. 2449. In these cases, information sufficient to protect public health or safety was publicly available from other sources. The Committee examined the case law to understand what courts are in fact doing when parties file motions for protective orders in discovery. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts often reexamine protective orders if intervenors or third parties raise concerns about them.

The Committee also considered specific proposals to amend Rule 26(c), intended to address the problems identified in S. 2449's predecessor bills. The Committee published proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Committee for further study. That study included the work described above.

The Legislation Would Have Significant Negative Consequences

The Committee also carefully considered the impact of requiring findings of fact before any discovery protective order could be issued. As noted, the empirical data showed that about 50% of the cases in which discovery protective orders of the type addressed in S. 2449 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery.

The risks to privacy are significantly greater today than when bills similar to S. 2449 were first introduced, because of the computer. The federal courts will soon all have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. New rules implementing the E-Government Act do not reduce the need for protective orders to safeguard against dissemination of highly personal and sensitive information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Although few cases involve discovery into information relevant to public health or safety hazards, S. 2449 would apply to all civil cases. In many cases, protective orders are essential to effective discovery management. That importance has increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Requiring courts to review information – which can often amount to thousands or even millions of pages – to make such determinations will burden judges and further delay pretrial discovery. Parties often rely on the ability to obtain protective orders in voluntarily producing information without the need for extensive judicial supervision. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to

discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Legislation Would Primarily Affect Information that is Not Publicly Available Because it is Not Filed With the Court

Not only would the proposed legislation exact a heavy toll on litigants, lawyers, and judges, its potential benefit would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Conclusion

The Committee opposes the proposed legislation on discovery protective orders on the ground that it is inconsistent with the Rules Enabling Act. The Committee's substantive concerns with the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

S. 2449 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Committee on Rules of Practice and Procedure asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committee asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. S. 2449 contains a similar provision. In April 2004 the FJC completed its comprehensive study, surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%).

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Committee was nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available information about potential hazards contained in other records that were

not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product-liability suit complaints, for example, specifically identified the product at issue, described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings."

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in S. 2449, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources – including the complaint – to inform the public of potential hazards in cases involving a sealed settlement agreement, the Committee concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements.

Summary

For these reasons, the Committee on Rules of Practice and Procedure has strong concerns about the discovery protective order and settlement order provisions of S. 2449 that you and the Judiciary Committee are urged to consider. I thank you for your consideration and look forward to continuing to work together to ensure that our civil justice system is just and fair.

Sincerely,

Lee H. Rosenthal
United States District Judge
Chair, Committee on Rules of Practice
and Procedure

cc: Members, Senate Committee on the Judiciary

Identical letter sent to: Senator Arlen Specter

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 26, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Department of Justice (DOJ) has reviewed S. 2449, the "Sunshine in Litigation Act of 2007." As a threshold matter, the Department does not believe that legislation of this kind is necessary. District court judges and magistrate judges routinely handle requests for the entry of protective orders, and the Department is not aware of any serious or widespread problem in the exercise of the district courts' authority to apply Rule 26(c) or maintain oversight of protective orders. Confidentiality issues are necessarily case-specific, and the individual judge assigned to the case is best suited to determine the propriety of maintaining the confidentiality of information disclosed by or to the parties, the conditions of nondisclosure, and the duration of any such protections. Moreover, the bill is inconsistent with recent amendments to the Federal Rules of Civil Procedure for protecting privileged information during electronic discovery.

We have the following concerns with S. 2449, in its current form:

General Comments

1. S. 2449 does not recognize important traditional uses of protective orders and agreements such as for protecting settlement negotiation exchanges, trade secrets, sensitive and classified information concerning national security, and privileged material including material subject to the attorney-client, law enforcement and deliberative process privileges. See Rule 26(c) of Federal Rules of Civil Procedure ("good cause" provision for issuing protective orders); Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3rd Cir. 1994) (adopting "good cause" requirement for issuing confidentiality orders); see also, testimony on Deputy Assistant Attorney General Carl J. Nichols, Senate Judiciary Committee, 13 February 2008 (concerning the use of protective orders in State Secrets cases). The bill would adversely affect DOJ's ability to resolve its cases as they commonly involve protection of public health or safety and some use protective or confidentiality orders for encouraging settlement negotiation exchanges and/or protecting trade secrets or national security. Rather than painting with a broad brush, Congress could amend its statutory language for existing federal causes of action to address any particular concerns in a more targeted fashion.

2. S. 2449 would displace the Federal Civil Rules of Procedure without amending them or undergoing the extensive legal review of the normal rules enabling process. By greatly limiting protective orders and agreements, the bill is out-of-sync with the 2006 electronic discovery amendments to the Federal Civil Rules of Procedure and proposed Rule 502 of Federal Rules of Evidence (see S. 2450). All these recent rule changes and proposals explicitly encourage confidentiality agreements and orders to guard against the real risks of inadvertent disclosure of privileged information during discovery in the computer age.

3. As currently drafted, section 2 of the bill would prohibit a court from entering a protective order for information obtained in civil discovery, unless the court found that the order would not restrict disclosure of "information relevant to the protection of public safety or health." Alternatively, the court could enter a protective order if it found that the public interest in disclosure of potential health and safety hazards is clearly outweighed by a specific and substantial interest in maintaining confidentiality and that the order is "no broader than necessary to protect the privacy interest asserted." In keeping with comments we raised when Congress debated similar legislation in the mid-1990s, we recommend amending this second "exception," so that it would explicitly recognize interests in protecting "privacy, *property, or other interests*."

Although we do not think the bill is unconstitutional, it could invite potential takings claims. The Supreme Court in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-04 (1984), recognized trade secrets as a species of property protected by the Fifth Amendment's Taking Clause. U.S. Const. amend. V. Because disclosure of vital business information or a trade secret may in some circumstances lead to a competitive disadvantage, litigants may claim that the disclosures contemplated by section 2 amount to court-approved takings of property for public use. *See* Note, *Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection*, 104 Harv. L. Rev. 1330, 1336 (1991) (arguing that courts are widely considered state actors for purposes of constitutional analysis and that the Supreme Court has held that the taking clause prohibited the Illinois judiciary from awarding one dollar as compensation for a right that was clearly worth more, *Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226, 233-35 (1897)), cited in Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 468 n.205 (1991); *Monsanto*, 467 at 1014-16 (conceivable public character constitutes public use; Congress determines mechanism). Accordingly, to guard against possible litigation risks, we suggest amending section 2 of the bill to make clear that courts may grant protective orders to protect proprietary interests.

4. A primary concern is that this bill calls for the district court to make specific factual findings both prior to entering a protective order and prior to continuing the protective order post-litigation. It thus infringes on judicial discretion and raises the likelihood of backlog and delay because of additional procedural requirements, without being based upon any finding that the courts are abusing their discretion to enter protective orders under the current system. Such

court management issues are preferably handled through the Federal Rules revisions process, rather than through legislation.

5. The bill provides that a confidentiality agreement cannot restrict disclosure of information to a Federal or state agency with law enforcement authority. There may be situations in which a Federal agency enters into such an agreement and legitimately may wish to preclude access to the information by a state agency. (However as a general rule, we typically include language in our confidentiality agreements that we have the right to share information with state or federal law enforcement authorities.)

6. The terms "public health or safety" and "potential health or safety hazards" used throughout the bill are not defined, which could lead to substantial uncertainty and litigation over the scope of the bill. Moreover, the two terms seem to be used interchangeably. If the same meaning is intended, then the same language should be used. If not, the difference in meanings should be explained in the bill.

7. Agencies of the Federal Government which are involved in civil litigation currently request "Privacy Act protective orders" on a regular basis to allow the agency to disclose in discovery information which is protected from disclosure under the Privacy Act.

In a 1992 views letter on an earlier version of S.2449, DOJ raised many of the above concerns and urged that the Government be excepted from the bill if it goes forward. This approach would be an improvement, particularly since the Government is already subject to the Freedom of Information Act and its settlements are generally public. However, there would still remain a risk of a compensable taking by the government such as for forced disclosure of a trade secret in private litigation (e.g., bill section 1660(a)(5)(A)). We note that a "Sunshine in Litigation" statute passed by the Florida legislature has a partial exemption for trade secrets. See section 69.081(5), F.S. (exemption for "trade secrets ... which are not pertinent to public hazards").

Technical Comments

1. Section 1660(a)(2) - These prohibitions would apply to all protective orders in all cases. As a result, courts in every case may be required to conduct a potentially time-consuming in camera review on all such requested orders, notwithstanding agreement by the parties. The requirement would add to the burden, length and time demands of litigation.

It is also unclear if this provision (and others in the bill) are intended to allow non-parties to argue that they have standing to intervene and challenge rulings. This could easily lead to increased litigation by potential intervenors over matters that are peripheral to the central dispute between the parties.

2. Section 1660(a)(2) - This provision on automatic termination of a protective order at the end of a case is confusing and would disrupt settled expectations of the conduct of cases including appeals. The finding to support continuation of the protective order would have to be included as a part of a final judgment or a post-judgment ruling. It would be unclear whether the protective order would remain in effect pending a request for a post-judgment ruling or appeal.

3. Section 1660(a)(5)(A) - see discussion above about takings risk of forced release of trade secret information.

4. Section 1660(a)(5)(B) - This provision barring a party from requesting a stipulated order would put a party in an impossible situation. A party would not know in advance whether its requested order would "violate this section," since the section allows the court to rule whether to issue the order. Would a ruling not to issue the order mean that the attorney is retroactively in violation of this bar? The attorney would have a Hobson's choice: request a stipulated order and risk someone arguing that the order is barred, or not request the order and risk violating ethical obligations to zealously represent the client.

5. Section 1660(c) -- The provision would seem to rewrite the law of contracts, which is a body of state law that usually allows parties to choose the terms of contract. Here, federal law would in effect require that at least certain forms of contracts - settlement agreements - be public. A party would not know whether a court would later find a confidentiality provision enforceable by a court after balancing under section 1660(c)(2). If the contract or settlement agreement did not allow for severability of the confidentiality provision, then the contract or agreement as a whole could be void or voidable. Moreover, for a party with trade secrets, presumably the party would later have to prove its basis for those trade secrets. It would be hard for such a party to plan whether the federal courts would be available to protect trade secrets. Finally, the definition of a "settlement agreement" is not clear, particularly as persons may settle potential claims as part of broader contract negotiations (not tied to any particular case). For all these reasons, federal courts might be seen as unavailable to resolve disputes.

6. Section 1660(c)(1)(A) - It is unclear whether the scope of this provision is limited to "matters related to public health or safety" (see 1660(c)(1)(B))?

7. Section 3 of S. 2449 states that the Act applies "only to orders entered in civil actions or agreements entered into on or after such date." Does this mean that the Act applies to all settlement agreements in all civil cases, even those not filed and entered in a court case? This seems somewhat inconsistent with section 1660(c)(1) which talks of cases between parties approved or enforced by a court.

Thank you for the consideration of our views. If we can be of further assistance on this legislation, please do not hesitate to contact this office. The Office of Management and Budget

has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Attachment

cc: The Honorable Arlen Specter
Ranking Member

The Honorable Jeff Sessions

Department of Justice

STATEMENT

OF

CARL J. NICHOLS
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"EXAMINING THE STATE SECRETS PRIVILEGE:
PROTECTING NATIONAL SECURITY WHILE PRESERVING ACCOUNTABILITY"

PRESENTED ON
FEBRUARY 13, 2008

Statement of
Carl J. Nichols
Deputy Assistant Attorney General
Civil Division
Department of Justice

Before the
Committee on the Judiciary
United States Senate

Concerning
"Examining the State Secrets Privilege:
Protecting National Security While Preserving Accountability "

February 13, 2008

Chairman Leahy, Ranking Member Specter, Members of the Committee, thank you for the opportunity to appear before you to address the important subject of today's hearing, the state secrets privilege. Since March 2005, I have served as a Deputy Assistant Attorney General in the Civil Division in the Department of Justice. In that capacity I both have been involved in the decisionmaking process regarding whether and when the Executive Branch will assert the state secrets privilege in civil litigation, and have gained an appreciation for the important role that the privilege plays in preventing the disclosure of national security information.

I would like to address two separate but related points in my testimony.

First, the state secrets privilege serves a vital function by ensuring that private litigants cannot use litigation to force the disclosure of information that, if made public, would directly harm the national security of the United States. The privilege has a longstanding history and has been invoked, during periods of both conflict and peace, to protect such information. But the role of the state secrets privilege is particularly important when, as now, our Nation is engaged in a conflict with a terrorist enemy in which intelligence is absolutely vital to protecting the

homeland. The privilege is thus firmly rooted in the constitutional authorities and obligations assigned to the President under Article II to protect the national security of the United States.

Second, accountability is preserved by a number of procedural and substantive requirements that must be satisfied before a court may accept an assertion of the state secrets privilege. These protections ensure that the privilege is asserted by the Executive Branch, and accepted by the courts, only in the most appropriate cases.

I. The State Secrets Privilege Plays a Critical Role in Preventing the Disclosure of National Security Information.

Any discussion of the state secrets privilege must begin with the vital role it plays in protecting the national security. The state secrets privilege permits the United States to ensure that civil litigation does not result in the disclosure of information related to the national security that, if made public, would cause serious harm to the United States. As the Supreme Court held in *United States v. Reynolds*, 345 U.S. 1, 10 (1953), such information should be protected from disclosure when there is a "danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." The Supreme Court recognized the imperative of protecting such information when it further held that even where a litigant has a strong need for that information, the privilege is absolute: "Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but *even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.*" *Id.* (emphasis added). As the Court of Appeals for the Fifth Circuit has noted, the "greater public good – ultimately the less harsh remedy – " is to protect the information from disclosure, even where the result might be dismissal of the lawsuit. *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992).

The state secrets privilege thus plays a critical role, even in peacetime. But the privilege is particularly important during times, such as the present, when our Nation is engaged in a conflict with an enemy that seeks to attack the homeland. We remain locked in a struggle with al Qaeda, a terrorist enemy that does not acknowledge or comply with basic norms of warfare; that seeks to operate by stealth and secrecy, using the openness of our society against us; and that intends to inflict indiscriminate, mass casualties in the civilian population of the United States. In these circumstances, litigation may risk disclosing to al Qaeda or other adversaries details regarding our intelligence capabilities and operations, our sources and methods of foreign intelligence gathering, and other important and sensitive activities that we are presently undertaking in our conflict. The state secrets privilege ensures that critical national security efforts are not weakened or endangered through the forced disclosure of highly sensitive information.

The state secrets privilege is rooted in the constitutional authorities and obligations assigned to the President under Article II as Commander in Chief and representative of the Nation in the realm of foreign affairs. It is well established that the President is constitutionally charged with protecting information relating to the national security. As the Supreme Court has stated, "[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

The state secrets privilege is not, therefore, a mere "common law" privilege. Instead, as the courts have long recognized, the privilege has a firm foundation in the Constitution. Any doubt that the privilege is rooted in the Constitution was dispelled in *United States v. Nixon*, 418

U.S. 683 (1974), in which the Supreme Court explained that, to the extent a claim of privilege "relates to the effective discharge of the President's powers, it is constitutionally based." *Id.* at 711. The Court then went on to expressly recognize that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets" – that is, the state secrets privilege – necessarily involves "areas of Art. II duties" assigned to the President. *Id.* at 710. The lower courts have reaffirmed this conclusion. *See, e.g., El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir.), *cert. denied*, 128 S.Ct. 373 (2007) (holding that the state secrets privilege "has a firm foundation in the Constitution"). As the D.C. Circuit has noted, the state secrets privilege "must head the list" of "the various privileges recognized in our courts." *Halkin v. Helms*, 598 F. 2d 1, 7 (D.C. Cir. 1978).

Before I turn to the second subject of my testimony, I would like to take an opportunity to discuss an issue arising out of *Reynolds* itself. Some have claimed that a review of declassified information in *Reynolds* demonstrates that the United States' assertion of the state secrets privilege in that case was somehow improper. Not only is that claim incorrect, but it has been rejected by two federal courts. In *Herring v. United States*, 2004 WL 2040272 (E.D. Pa. 2004), living heirs to those killed in the air crash at issue in *Reynolds* filed suit to set aside a settlement agreement, alleging that the United States' state secrets privilege assertion in *Reynolds* was fraudulent. After again reviewing the matter in 2004, Judge Davis held that the Air Force had not "misrepresent[ed] the truth or commit[ted] a fraud on the court" in *Reynolds*. *See Herring*, 2004 WL 2040272, at *5; *see also id.* at *6. Judge Davis reached this conclusion after analyzing precisely why disclosure of the information contained in an accident report of the crash would have caused harm to national security by revealing flaws in the B-29 aircraft. *See*

id. at 9. As Judge Davis found, "[d]etails of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security," and thus "may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike." *Id.* The Court of Appeals for the Third Circuit, reviewing the matter *de novo*, unanimously affirmed Judge Davis's decision. *See Herring v. United States,* 424 F.3d 384 (3rd Cir. 2005), *cert. denied*, 547 U.S. 1123 (2006).

II. Various Procedural and Substantive Requirements Ensure that the Privilege Is Invoked and Accepted Only in the Most Appropriate Cases.

Any discussion of the state secrets privilege should also recognize the significant procedural and substantive requirements for asserting the privilege. Several of these requirements are set forth in the Supreme Court's decision in *Reynolds*, and ensure that the privilege is invoked and accepted only in appropriate cases. This careful process ensures – and my experience confirms – that the privilege is not, in the words of the Supreme Court, "lightly invoked." 354 U.S. at 7.

Starting with the procedural protections, *Reynolds* enumerates three basic but important requirements. First, the privilege can be invoked only by the United States (that is, it cannot be invoked by a private litigant), and only through a "formal claim of privilege." *Reynolds*, 345 U.S. at 7-8. Second, the privilege cannot be invoked by a low-level government official, but instead must be "lodged by the head of the department which has control over the matter" – in other words, only an agency head may assert the privilege. *Id.* at 8. Third, that official must give "actual personal consideration" to the matter before asserting the privilege. *Id.* Separate from these important requirements, because the state secrets privilege is asserted in litigation, the Department of Justice, as the agency charged with conducting litigation involving the United

States, 28 U.S.C. §§ 516 & 519, must also agree that asserting the privilege in a particular situation is appropriate. Only if there is a "reasonable danger" that disclosure of the privilege will cause harm to the national security, *see Reynolds* at 10, will the privilege be asserted.

In practice, satisfying these requirements typically involves many layers of substantive review and protection. The agency with control over the information at issue reviews the information internally to determine if a privilege assertion is necessary and appropriate. That process typically involves considerable review by agency counsel and officials. Once that review is completed, the agency head – such as the Director of National Intelligence or the Attorney General – must personally satisfy himself or herself that the privilege should be asserted.

An important part of that process is the agency head's personal review of various materials, including the declaration (or declarations) that he or she must sign in order to assert the privilege. The point of such declarations is to formally invoke the privilege and to explain to the court the factual basis supporting the privilege. If the head of the department concludes that the privilege is warranted, the official formally invokes the privilege by signing the declarations, which are then made available to the court along with any supporting declarations. By signing the declarations, the department head and any supporting official attest, under penalty of perjury, to the truthfulness of their statements and to their personal attention to the matter.

Once the privilege is asserted, it is up to the court to decide whether, based on its review of the unclassified and classified materials that have been made available to it, the assertion should be upheld. It is well established that the court, in reviewing the privilege assertion, must accord the "utmost deference" to the privilege assertion and to the national security judgments of

the Executive Branch. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *see also Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (reaffirming "the need to defer to the Executive on matters of foreign policy and national security" and concluding that the court "surely cannot legitimately find [itself] second guessing the Executive in this arena"). Still, notwithstanding this deferential standard of review, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8. In other words, it is for the court to determine, after applying the appropriate level of deference, whether the Executive Branch has adequately demonstrated that there is a reasonable danger that disclosure of the information would harm the national security. This review serves as an important check in the state secrets process.

In making its determination, moreover, a court often reviews not just the public declarations of the Executive officials explaining the basis for the privilege, but also classified declarations providing further detail for the court's *in camera, ex parte* review. One misperception about the state secrets privilege is that the underlying classified information at issue is not shared with the courts, and that the courts instead are simply asked to dismiss cases based on trust and non-specific claims of national security. Instead, in every case of which I am aware, out of respect for the Judiciary's role the Executive Branch has made available to the courts both unclassified and classified declarations that justify, often in considerable detail, the bases for the privilege assertions. By way of example, the Court of Appeals for the Ninth Circuit recently noted in upholding the government's assertion of the state secrets privilege that the panel had:

> spent considerable time examining the government's declarations (both those publicly filed and filed under seal). *We are satisfied that the basis for the*

> *privilege is exceptionally well documented. Detailed statements [in the government's classified filings] underscore that disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security.*

Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007) (emphasis added); *see also id.* ("We take very seriously our obligation to review the documents with a very careful, indeed a skeptical eye, and not to accept at face value the government's claim or justification of privilege. Simply saying 'military secret,' 'national security,' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege. Sufficient detail must be – *and has been* – provided for us to make a meaningful examination.") (emphasis added).

Finally, I should also address the common misperception that the Executive Branch always seeks dismissal in each case in which it has asserted the state secrets privilege, and that the courts must dismiss each case in which the privilege has been asserted. That is incorrect. Instead, once a court has concluded that the privilege has been properly asserted, the privileged information is removed from the case, and the court must then decide whether, and how, the case can proceed without that information. To be sure, the result is that some cases must be dismissed because there is no way to proceed without the information. But in other cases, the privileged information is peripheral and the case can proceed without it. By way of example, in *BCG v. Guerrieri, et al.*, No. 2004CV395 (Weld Cty., Colo. 19th Dist. Ct.), a real estate and contract dispute between private parties, the United States asserted the state secrets privilege over certain information and moved for a protective order precluding disclosure of that information, but did *not* seek dismissal of the action.

* * *

Thank you, Mr. Chairman, for the opportunity to address the Committee. I would be happy to address any questions that the Members may have.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 5, 2007

Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Arlen Specter
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC

Dear Mr. Chairman and Senator Specter:

The Judicial Conference of the United States strongly opposes the "Sunshine in the Courtroom Act of 2007," S. 352 (110th Cong.), because it would allow for the use of cameras in federal trial courts. This legislation, if enacted, has the potential to impair substantially the fundamental right of citizens to a fair trial, while undermining court security and the safety of trial participants, including judges. The Judicial Conference also opposes the legislation because it would allow for the use of cameras in all courts of appeals, rather than allowing that decision to be made first by each court of appeals, as is the present practice. I am providing these views and the following explanation to you on behalf of the Judicial Conference, the policy-making body for the Federal Judiciary.

The Judicial Conference's policy opposing the use of cameras in the federal trial courts is the result of decades of experience and study. Indeed, the Conference has studied and considered the issue in a number of different situations and contexts –

including a pilot project – and has determined that the presence of cameras in the federal trial courts is not in the best interests of justice.

Federal judges are charged with safeguarding each citizen's right to a fair and impartial trial. It is this right to a fair trial that is the crucial difference between the use of cameras in a trial court versus their present use in many legislative, administrative, or ceremonial proceedings. Thus, the paramount question in determining whether cameras should be used in federal courts should not be whether more openness would be enjoyed by the public and media, but whether the presence of cameras has the potential to deprive each citizen of his or her ability to have a claim or right fairly resolved in United States district courts. And, while the legislation provides for a judge's discretion to deny the use of cameras, the Judicial Conference believes it unwise to allow for the possibility that camera coverage of trial court proceedings could compromise a citizen's right to a fair trial, and this might not be evident until the televised trial was underway. Therefore, the Judicial Conference strongly opposes any legislation that would allow cameras in the federal trial courts.

The ways in which cameras can interfere with a fair trial are numerous. First, the broadcasting of proceedings can affect the way trial participants behave. On the one hand, it could produce an intimidating effect on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast. Although the present version of the Sunshine in the Courtroom Act prohibits the "televising" of any juror, photographs of jurors could be published in print media, such as newspapers and magazines, as well as on the Internet. Jurors might purposely answer *voir dire* questions with the intention of being removed from the jury pool. On the other hand, participants in the proceeding might change their behavior in ways to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera. Such grandstanding would be disruptive to the proceedings. As a result, the Federal Judiciary is very concerned that the effect of cameras in the courtroom on participants could profoundly and negatively impact the trial process, thereby possibly interfering with a fair trial.

Whether or not participants in the proceeding change their behavior as a result of the presence of cameras, security and safety issues also arise. For judges and court employees, such as court reporters, courtroom deputies, and perhaps law clerks, showing

their image in the broadcast would allow them to be more easily identified, thereby making them easier targets for either attempts to influence the outcome of the matter or retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase. Similar security concerns are created for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

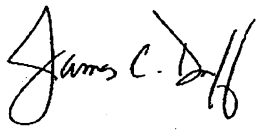
Moreover, camera coverage could create privacy concerns for many individuals involved in the trial, such as jurors, witnesses, and victims, some of whom are, at best, tangentially related to the case, but about whom very personal and identifying information may be revealed. For example, efforts to discredit a witness frequently involve the revelation of embarrassing personal information. It is one thing to have embarrassing facts or accusations aired in a courtroom; it is another entirely to have them aired on television with additional possibility of taping and replication. This concern can have a material effect on a witness's testimony or on his or her willingness to testify at all.

If camera coverage is permitted, it could become a potent negotiating tactic in pretrial settlement discussions. Parties may choose not to exercise their right to trial because of concerns regarding possible camera coverage. For example, allowing cameras could cause a "chilling effect" on civil rights litigation, since plaintiffs who have suffered sex or age discrimination may simply decide not to file suit if they learn that they may have to relive the incident and have that description broadcast to the public. Or, parties litigating over medical issues (like those caused by exposure to asbestos) may not wish to reveal their personal medical history and conditions to a broad audience.

Regarding the courts of appeals, the Judicial Conference has taken a different view. Because an appellate proceeding does not involve witnesses and jurors, the reasons for the Conference's strong opposition to cameras in the trial courts do not generally apply or are diminished. Therefore, 11 years ago, the Conference adopted the position that each court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt. By allowing the individual courts of appeals to determine whether cameras will be allowed at their proceedings – rather than leaving the decision up to the presiding judge of each appellate panel as the bill proposes – litigants within each circuit are treated in a consistent and deliberate manner. Further, this approach avoids a piecemeal and *ad-hoc* resolution of the issue among the various panels convened within a court of appeals.

For these reasons, the Judicial Conference of the United States strongly opposes legislation that allows the use of cameras in the federal trial courts and that allows the use of cameras in all courts of appeals instead of deferring to individual appellate courts on such use. Thank you for the opportunity to provide the position of the Judicial Conference on this legislation, which raises an issue of vital importance to the Judiciary. Please do not hesitate to contact me if you have any questions or concerns regarding this matter.

Sincerely,



James C. Duff
Secretary

cc: Members of the Senate Judiciary Committee

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

June 12, 2007

Honorable John Conyers, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Honorable Lamar Smith
Ranking Member, Committee on the Judiciary
United States House of Representatives
B-351 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman and Representative Smith:

On behalf of the Judicial Conference of the United States, I write to provide the position of the Conference on a bill introduced by Representative Steve Chabot, the "Sunshine in the Courtroom Act of 2007" (H.R. 2128, 110th Cong.). The Judicial Conference strongly opposes H.R. 2128 because it allows the use of cameras in federal trial courts. The Conference also opposes the legislation because it allows the use of cameras in all courts of appeals, rather than allowing that decision to be made first by each court of appeals, as is the present practice. If enacted, this legislation will have the potential to impair substantially the fundamental right of citizens to a fair trial, while undermining court security and the safety of trial participants, including judges.

The Judicial Conference's policy opposing the use of cameras in the federal trial courts is the result of decades of experience and study. Indeed, the Conference has studied and considered the issue in a number of different situations and contexts –

including a pilot project – and has determined that the presence of cameras in the federal trial courts is not in the best interests of justice.

Federal judges are charged with safeguarding each citizen's right to a fair and impartial trial. It is this right to a fair trial that is the crucial difference between the use of cameras in a trial court versus their present use in many legislative, administrative, or ceremonial proceedings. Thus, the paramount question in determining whether cameras should be used in federal courts should not be whether more openness would be enjoyed by the public and media, but whether the presence of cameras has the potential to deprive each citizen of his or her ability to have a claim or right fairly resolved in United States district courts. And, while the legislation provides for a judge's discretion to deny the use of cameras, the Judicial Conference believes it unwise to allow for the possibility that camera coverage of trial court proceedings could compromise a citizen's right to a fair trial, and this would not be evident until the televised trial was underway. Therefore, the Judicial Conference opposes any legislation that would allow cameras in the federal trial courts.

The ways in which cameras can interfere with a fair trial are numerous. First, the broadcasting of proceedings can affect the way trial participants behave. On the one hand, it could produce an intimidating effect on litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast. Although the present version of the Sunshine in the Courtroom Act prohibits the "televising" of any juror, photographs of jurors could be published in print media, such as newspapers and magazines, as well as on the Internet. Jurors might purposely answer *voir dire* questions with the intention of being removed from the jury pool. On the other hand, participants in the proceeding might change their behavior in ways to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience or to lengthen their appearance on camera. Such grandstanding would be disruptive to the proceedings. As a result, the Federal Judiciary is very concerned that the effect of cameras in the courtroom on participants could profoundly and negatively impact the trial process, thereby possibly interfering with a fair trial.

Whether or not participants in the proceeding change their behavior as a result of the presence of cameras, security and safety issues also arise. For judges and court employees, such as court reporters, courtroom deputies, and perhaps law clerks, showing

their image in the broadcast would allow them to be more easily identified, thereby making them easier targets for either attempts to influence the outcome of the matter or retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase. Similar security concerns are created for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

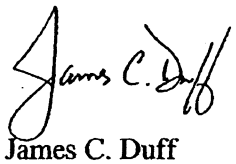
Moreover, camera coverage could create privacy concerns for many individuals involved in the trial, such as jurors, witnesses, and victims, some of whom are, at best, tangentially related to the case, but about whom very personal and identifying information may be revealed. For example, efforts to discredit a witness frequently involve the revelation of embarrassing personal information. It is one thing to have embarrassing facts or accusations aired in a courtroom; it is another entirely to have them aired on television with additional possibility of taping and replication. This concern can have a material effect on a witness's testimony or on his or her willingness to testify at all.

If camera coverage is permitted, it could become a potent negotiating tactic in pretrial settlement discussions. Parties may choose not to exercise their right to trial because of concerns regarding camera coverage. For example, allowing cameras could cause a "chilling effect" on civil rights litigation, since plaintiffs who have suffered sex or age discrimination may simply decide not to file suit if they learn that they may have to relive the incident and have that description broadcast to the public. Or, parties litigating over medical issues (like those caused by exposure to asbestos) may not wish to reveal their personal medical history and conditions to a broad audience.

Regarding the courts of appeals, the Judicial Conference has taken a different view. Because an appellate proceeding does not involve witnesses and jurors, the reasons for the Conference's strong opposition to cameras in the trial courts do not generally apply or are diminished. Therefore, eleven years ago, the Conference adopted the position that each court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt. By allowing the individual courts of appeals to determine whether cameras will be allowed at their proceedings – rather than leaving the decision up to the presiding judge of each appellate panel as the bill proposes – litigants within each circuit are treated in a consistent and deliberate manner. Further, this approach avoids a piecemeal and *ad-hoc* resolution of the issue among the various panels convened within a court of appeals.

For these reasons, the Judicial Conference of the United States strongly opposes the use of cameras in the federal trial courts and opposes allowing the use of cameras in all courts of appeals instead of deferring to individual appellate courts on such use. Thank you for the opportunity to provide the position of the Judicial Conference on this legislation, which raises an issue of vital importance to the Judiciary. Please do not hesitate to contact me if you have any questions or concerns regarding this matter.

Sincerely,



James C. Duff
Secretary

cc: Members of the House Judiciary Committee

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On August 16, 2007, I sent you a letter expressing the Judicial Conference's opposition to the Bail Bond Fairness Act of 2007, which the House of Representatives passed on June 25, 2007 (H.R. 2286). A copy of that letter is enclosed. An identical bill was introduced in the Senate on December 18, 2007 (S. 2495). The Judicial Conference opposes S. 2495 because it would weaken the courts' ability to enforce bail conditions, necessary to protect public safety. The reasons for the Judicial Conference opposition are set out in the August 2007 letter. I write now to suggest that, if the bill is likely to proceed, your Committee consider a narrower approach that would allow courts to hold accountable a person who has violated a release condition, while meeting the concerns of the bail bond industry that led to the proposed legislation.

The bill would amend Rule 46(f)(1) of the Federal Rules of Criminal Procedure to eliminate a judge's authority to forfeit a bail bond if the person released on that bond breaches any release condition other than the condition requiring appearance at a scheduled court proceeding. Rule 46(f)(1) presently states: "The court must declare the bail forfeited if a condition of the bond is breached." The bill would revise Rule 46(f)(1) to state: "The court must declare the bail forfeited if the defendant fails to appear physically before the court." The bill would amend Rule 46(f)(1) to authorize bond forfeiture only if the released person failed to appear at a scheduled court proceeding, relieving not only corporate sureties from accountability for violations of other release conditions, but also relieving the released person and friends and relatives who act as personal sureties. If courts are deprived of the authority to hold noncorporate parties responsible when persons released on bonds violate conditions of those bonds, judges will be compelled to retain more persons in custody to protect public safety.

A narrower approach that would accomplish the same goal as the bill would be to relieve a third-party corporate surety from liability for violations of release conditions other than failing to appear before the court. Present Rule 46(f)(1) could be revised to state: "The court must

declare the bail forfeited if a condition of the bond is breached; however, the corporate surety is liable only if the person released on a bond fails to appear before the court." Under this approach, the person on bond – or that person's friends or relatives who signed as personal sureties – would continue to risk bond forfeiture if that person violated release conditions, including conditions other than those requiring physical appearance before the court. This approach would continue to provide federal judges with tools to enforce a released person's compliance with bail conditions, necessary for public safety – including the safety of crime victims – while relieving third-party corporate sureties from liability for violations of conditions other than the condition of court-ordered appearances.

This narrower approach is fully consistent with the interests of the bail bond industry. Richard Verrochi, President of the Professional Bail Agents of the United States, testified on behalf of the industry during the hearing before the House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security on October 8, 2002. In response to a direct question, Mr. Verrochi said, "I have no problem at all in making the individual, himself or herself, if they violate a condition of the bond and it is their property and they have put it up or their resources, revoking it, because to me, that is something within their control."

The Judicial Conference continues to ask you and your Committee to decline to support S. 2495. The proposed amendment to Rule 46(f)(1) is broader than necessary to achieve its purpose. The bill could accomplish that purpose without also weakening the courts' ability to enforce bail conditions and protect public safety.

Thank you for your consideration. If you have any questions or want additional information, please do not hesitate to contact Cordia A. Strom, Assistant Director, Office of Legislative Affairs, at (202) 502-1700.

Sincerely,

James C. Duff
Secretary

Enclosure

Identical letter sent to Senator Arlen Specter
cc: Members, Senate Committee on the Judiciary

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

March 24, 2008

Dr. Douglas E. Beloof
Associate Professor of Law
Director, National Crime Victim Law Institute
at Lewis & Clark Law School
10015 S.W. Terwilliger Boulevard
Portland, OR 97219-7799

Dear Professor Beloof:

At the Chief Justice's request, the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee") provided comments on your recommendation to appoint a crime victims' rights representative as a permanent member of the Advisory Committee on Criminal Rules (the "Advisory Committee"). The Standing Committee recommended against this request after the Advisory Committee had studied the request and also recommended against it. After carefully considering your recommendation and the views of the Standing Committee and Advisory Committee, the Chief Justice has decided to decline appointing a victims' rights representative as a permanent member of the Advisory Committee at this time.

The Chief Justice shares the Standing and Advisory Committees' concerns that it is inadvisable to add representatives of interest or advocacy groups as permanent members of rules committees. Having a member appointed specifically to serve as an advocate in this fashion is inconsistent with how committee members and committees are expected to work, with a shared focus on improving the administration of justice overall. In addition, such an appointment would create a precedent for other groups.

Though your request was not approved, I am pleased to report that the rules committees continue to press for greater participation by crime victims' rights advocates in the rulemaking process. The Advisory Committee contacted more than 25 victims' rights national organizations and requested their comment on proposed new amendments to the Federal Criminal Rules, which augment victims' rights amendments to six other criminal rules now pending before the Supreme Court. The Advisory Committee also

asked these organizations for information on the federal courts' experience in implementing the Crime Victims' Rights Act and whether there are specific problems that could best be addressed by rules changes. The Advisory Committee is looking forward to these comments and to continuing to work with the organizations.

The openness of the Rules Enabling Act rulemaking process affords lawyers and interested persons with many opportunities to address the rules committees, propose new rules, answer questions, and make suggestions. Public participation in the rulemaking process is integral to its success. Committee meetings are open to the public. Proposals to amend rules are widely disseminated and public comment is encouraged. The Advisory Committee is taking steps to ensure that crime victims' organizations are fully aware of their opportunity to submit proposals, comments, and criticisms and to attend the Committee's meetings as well as hearings on proposed rules. At its recent meeting, the Advisory Committee discussed victims' concerns with Professor Paul Cassell.

The Advisory Committee is also working in other ways to improve communications with crime victims' organizations and to improve its understanding of their concerns. The Department of Justice has organized a meeting with representatives of national victims' groups in Washington, D.C., and will hold such meetings on a regular basis. The Advisory Committee will receive a report on the meeting from the Assistant Attorney General for the Criminal Division when the Committee holds its next meeting. The Department plans to meet with the victims' advocates before every Advisory Committee meeting and give a report at each meeting. The Advisory Committee is also working with the Federal Judicial Center to ensure that federal judges are fully informed about the Crime Victims' Rights Act.

The protection of victims' rights is vital to the administration of justice. The rules committees are committed to ensuring that the concerns of victims' advocates are heard and fully considered.

Thank you for your letter.

Sincerely,

James C. Duff
Director

cc: Honorable Lee Rosenthal
Honorable Richard Tallman

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
110th Congress

SENATE BILLS

- S.186 - *Attorney-Client Privilege Protection Act of 2007*
  - Introduced by: Specter
  - Date Introduced: 1/4/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/4/07). Judiciary Committee held hearing (9/18/07).
  - Related Bills: H.R. 3013
  - Key Provisions:

    — Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

- S. 344 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Specter
  - Date Introduced: 1/22/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/22/07). Judiciary Committee held hearing (2/14/07). Senate Judiciary Committee reported favorably (12/6/07).

---

[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

- Related Bills: S. 352, H.R. 1299
- Key Provisions:

  — Section 1 amends **Chapter 45, Title 28, U.S.C.**, requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- S. 352 - *Sunshine in the Courtroom Act of 2007*
  - Introduced by: Grassley
  - Date Introduced: 1/22/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/22/07). Senate Judiciary Committee held hearing (2/14/07). Senate Judiciary Committee approved with amendments by a vote of 10-8 (3/6/08).
  - Related Bills: S. 344, H.R. 1299, HR 2128
  - Key Provisions:

    — Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party.

    Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial.

    The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

    Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

    [On March 6, 2008, the Senate Judiciary Committee approved S. 352 by a vote of 10-8 after adopting several amendments to the bill: (1) the presiding judge must not allow camera coverage if the judge determines that it would violate the due process rights of any party; (2) the Judicial Conference must promulgate

mandatory guidelines on shielding certain witnesses from camera coverage, including crime victims, families of crime victims, cooperating witnesses, undercover law enforcement officers, witnesses relating to witness relocation and protection, or minors under the age of 18; and (3) nothing in the bill limits the inherent authority of a court to protect witnesses, preserve the decorum and integrity of the legal process, or protect the safety of an individual. An amendment to remove the district courts from the legislation was defeated by a tie vote of 9-9].

- S. 456 - *Gang Abatement and Prevention Act of 2007*
  - Introduced by: Feinstein
  - Date Introduced: 1/31/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/31/07). Hearing held (6/5/07). Committee reported favorably with amendments (6/14/07). Reported with amendment in nature of substitute (7/30/07). Passed the Senate (9/21/07). Referred to the House Judiciary, Energy and Commerce, and Education and Labor Committees (9/24/07). Referred to the House Subcommittee on Healthy Families and Communities (10/17/07).
  - Related Bills: S. 990, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:

    — Section 205 directs the Standing and Evidence Rules Committee to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- S. 990 - *Fighting Gangs and Empowering Youth Act of 2007*
  - Introduced by: Menendez
  - Date Introduced: 3/26/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (3/26/07).
  - Related Bills: S. 456, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:

    — Section 310 amends **Evidence Rule 804(b)(6)** by providing that a "[a] statement offered against a party that has engaged, acquiesced, or conspired, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

- S. 1267 - *Free Flow of Information Act of 2007*
  - Introduced by: Lugar
  - Date Introduced: 5/2/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/2/07).
  - Related Bills: H.R. 2102, S. 2035
  - Key Provisions:

    — Section 2 provides that a federal entity may not compel a "covered person" to

testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

- S. 1749 - *Crime Victims' Rights Rules Act of 2007*
  - Introduced by: Kyl
  - Date Introduced: 6/29/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (6/29/07).
  - Related Bills: None.
  - Key Provisions:

    — Section 1 expressed the sense of Congress that the Chief Justice should appoint at least one member on the Committee of Rules of Practice and Procedure and the Advisory Committee on Criminal Rules who is a victims' rights advocate.

    — The legislation amends 33 rules in the Federal Rules of Criminal Procedure that create additional rights for crime victims.

- S. 2035 - *Free Flow of Information Act of 2007*
  - Introduced by: Specter
  - Date Introduced: 9/10/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (9/10/07).

  Senate Judiciary Committee reported, with amendments, bill by vote of 15-2 (10/4/07).
  - Related Bills: H.R. 2102, S. 1267
  - Key Provisions:

    — Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred, that the testimony or document sought is essential to the investigation, prosecution, or defense, and any unauthorized disclosure has caused significant, clear, and articulable harm to national security; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; and (4)

nondisclosure of the information be contrary to public interest. The content of any testimony or document compelled under this section must be: (1) limited to the purpose of verifying published information or describing surrounding circumstances relevant to the accuracy of the published information, and (2) be narrowly tailored in subject matter and period of time so as to avoid compelling production of peripheral, nonessential, or speculative information.

— Section 2 does not apply to information obtained as a result of eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person; information necessary to prevent or mitigate death, kidnaping, or substantial bodily harm; and information that a federal court has found by a preponderance of the evidence that would assist in preventing acts of terrorism in the United States or significant harm to national security.

- S. 2237 - *Crime Control and Prevention Act of 2007*
  - Introduced by: Biden
  - Date Introduced: 10/25/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/25/07).
  - Related Bills: S. 456, S. 990, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:

    — Section 245 directs the Judicial Conference to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- S. 2449 - *Sunshine in Litigation Act of 2007*
  - Introduced by: Kohl
  - Date Introduced: 12/11/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (12/11/07). Senate Judiciary Committee approved substitute amendment by a vote of 12-6 (3/6/08).
  - Related Bills: H.R. 5884
  - Key Provisions:

    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

— Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

[The substitute amendment added two provisions to the original bill: (1) there is a rebuttable presumption that the interest in protecting a person's financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information.]

- S.2450 - *To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine*
  - Introduced by: Leahy
  - Date Introduced: 12/11/07
  - Status: Read twice and referred to the Senate Committee on the Judiciary (12/11/07). Senate Judiciary Committee approved without amendment (1/31/08). Senate Report No. 110-264 filed (2/25/08).
  - Related Bills: None
  - Key Provisions:

    — Section 1 amends **the Federal Rules of Evidence** by adding a new Evidence Rule 502 on waiver of attorney-client privilege and work product protection. The legislation tracks the language of proposed Evidence Rule 502, as approved by the Judicial Conference of the United States at its September 2007 session.

HOUSE BILLS

- H.R. 851 -*Death Penalty Reform Act of 2007*
  - Introduced by: Gohmert
  - Date Introduced: 2/6/07
  - Status: Referred to House Committee on the Judiciary (2/6/07).
  - Related Bills: H.R. 1914
  - Key Provision:

    — Section 8 amends **Criminal Rule 24(c)** by permitting the court to empanel up to nine alternate jurors and allowing each side an additional four peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 880 - *Gang Deterrence and Community Protection Act of 2007*
  - Introduced by: Forbes
  - Date Introduced: 2/7/07
  - Status: Referred to the House Committee on the Judiciary (2/7/07). Referred to House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (3/1/07).
  - Related Bills: H.R. 1582, H.R. 1692, H.R. 3547, S. 456, S. 990, S. 2237
  - Key Provisions:

— Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

- H.R. 1012 - *Small Business Growth Act of 2007*
  - Introduced by: Buchanan
  - Date Introduced: 2/13/07
  - Status: Referred to the House Committees on Education and Labor, Small Business, Judiciary, Oversight and Government Reform, and Ways and Means (2/13/07). Referred to House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property (3/19/07). Referred to the House Subcommittee on Health, Employment, Labor and Pensions (6/5/07).
  - Related Bills: None
  - Key Provisions:

    — Title IV amends **Civil Rule 11** by: (1) imposing additional, mandatory sanctions on attorneys, law firms, and parties; (2) making the rule applicable in state cases affecting interstate commerce; (3) imposing a "three-strike" rule on attorneys who commit multiple violations of the rule; (4) creating a presumption of a rule violation when the same issue is relitigated; (5) providing enhanced sanctions for the willful and intentional destruction of documents in a pending federal court proceeding; and (6) by limiting a court's discretion in sealing a Rule 11 proceeding.

- H.R. 1299 - *To Permit the Televising of Supreme Court Proceedings*
  - Introduced by: Poe
  - Date Introduced: 3/1/07
  - Status: Referred to the House Committee on the Judiciary (3/1/07).
  - Related Bills: S. 344, S. 352, H.R. 2128
  - Key Provisions:

    — Section 1 amends **28 U.S.C. Chapter 45** by inserting a new section 678 requiring the Supreme Court to permit television coverage of all open sessions of the Court unless the unless the Court decides, by a majority vote of all justices, that allowing such coverage in a particular case would violate the due process rights of one or more of the parties.

- H.R. 1582 - *Gang Abatement and Prevention Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 3/20/07
  - Status: Read twice and referred to the House Committee on the Judiciary (3/20/07). Referred to the House Subcommittee on Crime, Terrorism, and Homeland Security (4/20/07).
  - Related Bills: H.R. 880, H.R. 1692, H.R. 3547, S. 456, S. 990, S. 2237

• Key Provisions:

— Section 205 directs the Standing and Evidence Rules Committee to consider "the necessity and desirability of amending section 804(b) of the Federal Rules of Evidence to permit the introduction of statements against a party by a witness who has been made unavailable where it is reasonably foreseeable by that party that wrongdoing would make the declarant unavailable."

- H.R. 1592 - *Local Law Enforcement Hate Crimes Prevention Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 3/20/07
  - Status: Read twice and referred to the House Committee on the Judiciary (3/20/07). Reported (Amended) by the Committee on Judiciary. H. Rept. 110-113. (4/30/2007). Passed by the House by a vote of 237-180 (5/3/2007). Received in the Senate, read twice, and referred to the Committee on the Judiciary (5/7/2007).
  - Related Bills: None
  - Key Provisions:

    — Section 6 amends **Chapter 13, Title 18, U.S.C.**, by including the following provision: "In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness."

- H.R. 1692 - *Fighting Gangs and Empowering Youth Act of 2007*
  - Introduced by: Pallone
  - Date Introduced: 3/26/07
  - Status: Read twice and referred to the House Committees on the Judiciary, Education and Labor, and Financial Services (3/26/07). Referred to the House Subcommittee on Housing and Community Opportunity (6/8/07). Referred to House Subcommittee on Healthy Families and Communities (6/27/07).
  - Related Bills: H.R. 880, H.R. 1582, H.R. 3547, S. 456, S.990, S. 2237
  - Key Provisions:

    — Section 310 amends **Evidence Rule 804(b)(6)** by providing that a "[a] statement offered against a party that has engaged, acquiesced, or conspired, in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

- H.R. 1914 -*Terrorism Death Penalty Act of 2007*
  - Introduced by: Carter
  - Date Introduced: 4/18/07
  - Status: Referred to House Committee on the Judiciary (4/18/07). Referred to Subcommittee on Crime Terrorism, and Homeland Security (5/4/07).
  - Related Bills: H.R. 851
  - Key Provision:

— Section 3 amends **Criminal Rule 24(c)** by permitting the court to empanel up to nine alternate jurors and allowing each side an additional four peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 2102 - *Free Flow of Information Act of 2007*
  - Introduced by: Boucher
  - Date Introduced: 5/2/07
  - Status: Read twice and referred to the House Committee on the Judiciary (5/2/07). Hearing held (6/14/07). Committee held markup session and ordered reported (8/1/07). House passed bill with amendment below by vote of 398-21 (10/16/07).
  - Related Bills: S. 1267, S. 2035
  - Key Provisions:

— Section 2 provides that a federal entity may not compel a "covered person" to testify or produce documents in any proceeding unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the testimony or document sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the testimony or document sought is essential to the successful completion of that matter; (4) in any matter in which the testimony or document sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law; and (5) nondisclosure of the information be contrary to public interest. Section 2 also requires that compelled disclosure of testimony or documents be limited and narrowly drawn.

[The Boucher/Pence amendment limits the scope of a journalist's protection by: (1) allowing disclosure of information to prevent or identify the perpetrator of a terrorist attack or harm to national security; (2) allowing disclosure of the identity of a person involved in leaking properly classified information; (3) permitting law enforcement officers to seek a court order compelling production of documents and information obtained as the result of eyewitness observations of alleged criminal or tortious conduct; (4) limiting coverage to a person who "regularly" engages in the listed journalistic activities and including exceptions to the definition of "covered person."]

- H.R. 2128 - *Sunshine in the Courtroom Act of 2007*
  - Introduced by: Chabot
  - Date Introduced: 5/3/07
  - Status: Read twice and referred to the House Committee on the Judiciary (5/3/07). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property

(6/4/07). Subcommittee discharged (9/20/07). Judiciary Committee held hearing (9/27/07). Committee held markup session and ordered bill to be reported favorably by vote of 17-11 (10/24/07).

• Related Bills: S. 344, S. 352, H.R. 1299

• Key Provisions:

— Section 2 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The presiding judge, however, may not permit the above: (1) in a proceeding involving only the presiding judge if that judge determines that the action would violate the due process rights of any party, or (2) in a proceeding involving more than one judge, a majority of judges determines that the action would violate the due process rights of any party.

Section 2 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Upon request of any witness in a trial proceeding, the court must order that the face and voice of the witness be disguised. The presiding judge in a trial must inform each witness who is not a party that he or she has the right to request that his or her image or voice may be disguised. The presiding judge must not permit the televising of any juror in a trial.

The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

Section 2 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

● H.R. 2286 - *Bail Bond Fairness Act of 2007*

• Introduced by: Wexler

• Date Introduced: 5/10/07

• Status: Read twice and referred to the House Committee on the Judiciary (5/10/07). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (6/1/07). Subcommittee held markup session (6/12/07). Committee considered, held markup session, and ordered reported by voice vote (6/13/07). House Report 110-208 filed (6/22/07). House passed by voice vote (6/25/07). Received in Senate, read twice, and referred to Committee on the Judiciary (6/26/07).

• Related Bills: None

• Key Provisions:

— Section 3 amends **Criminal Rule 46(f)(1)** limiting the authority of the court to declare bail forfeited. (Criminal Rule 46(f)(1) provides that the court must declare bail forfeited if a person breached a condition of the bail bond. H.R. 2286 amends the rule to limit the court's authority to declare bail forfeited only where

the person actually fails to appear physically before a court as ordered, and not where the person violates some other collateral condition of release.)

- H.R. 2325 - *Court and Law Enforcement Officers Protection Act of 2007*
  - Introduced by: Gohmert
  - Date Introduced: 5/15/07
  - Status: Read twice and referred to the House Committee on the Judiciary (5/15/07). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (6/4/07).
  - Related Bills: None
  - Key Provisions:

    — Section 7(c) amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts by adding at the end the following: "Rule 60(b)(6) of the Federal Rules of Civil Procedure does not apply to proceedings under these rules."

- H.R. 3013 - *Attorney-Client Privilege Protection Act of 2007*
  - Introduced by: Scott
  - Date Introduced: 7/12/07
  - Status: Read twice and referred to the House Committee on the Judiciary (7/12/07). Referred to the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security (7/20/07). Markup session held and subcommittee forwarded to full committee by voice vote (7/24/07). Judiciary Committee held mark-up session and ordered reported by voice vote (8/1/07). House Report No. 110-445 filed (11/13/07). Passed House by voice vote (11/13/07).
  - Related Bills: S. 186
  - Key Provisions:

    — Section 3 amends **18 U.S.C. Chapter 201** by adding a new § 3014 that prohibits a federal agent or attorney in a federal investigation, civil enforcement matter, or criminal proceeding from demanding from an organization attorney-client privilege or work product protection materials. Section 3 also prohibits the government from basing its decision to file a charging document in a civil or criminal case on whether: (1) the attorney-client privilege or work product protection is asserted; (2) the organization provides counsel or pay attorney's fees for counsel appointed to represent an employee of the organization; (3) the organization enters into a joint defense, information sharing, or common-interest agreement with an employee in an investigation or enforcement matter; (4) the sharing of information with an employee in relation to an investigation or enforcement matter involving that employee; and (5) the organization fails to terminate an employee because that employee invoked his or her fifth amendment right against self incrimination or other legal right in response to a government request. Section 3 also states that it does not prohibit an organization from voluntarily offering to share "internal investigation materials of such organization."

- H.R. 3147 - *Counter-Terrorism and National Security Act of 2007*
  - Introduced by: Wilson
  - Date Introduced: 7/24/07
  - Status: Read twice and referred to the House Committee on the Judiciary (7/24/07). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (8/10/07).
  - Related Bills: None
  - Key Provisions:
    — Section 9 amends **Criminal Rule 41(b)(3)** giving magistrate judges authority to issue search warrants in certain multidistrict terrorism investigation cases.

- H.R. 3547 - *Gang Prevention, Intervention, and Suppression Act of 2007*
  - Introduced by: Schiff
  - Date Introduced: 9/17/07
  - Status: Read twice and referred to the House Committees on the Judiciary and Education and Labor (9/17/07). Referred to the House Subcommittee on Healthy Families and Communities (10/17/07).
  - Related Bills: S. 456, S. 990, S. 2237, H.R. 880, H.R. 1582, H.R. 1692, H.R. 3547
  - Key Provisions:
    — Section 204 directs the Judicial Conference to study **Evidence Rule 804(b)** "to determine the necessity and desirability of amending that section, including the possible expansion of section 804(b)(6), and shall make modifications as the Judicial Conference sees fit."

- H.R. 4302 - *To Amend Title 18, United States Code, to Require the Reading in Open Court in Criminal Cases of Crime Victims' Rights*
  - Introduced by: Chabot
  - Date Introduced: 12/6/07
  - Status: Read twice and referred to the House Committee on the Judiciary (12/6/07). Referred to the House Subcommittee on Crime, Terrorism, and Homeland Security (1/14/08).
  - Related Bills: None
  - Key Provisions:
    — The bill amends 18 U.S.C. § 3771(b) by requiring the trial judge to read in open court the rights of crime victims at the start of every criminal proceeding or at sentencing.

- H.R. 5884 - *Sunshine in Litigation Act of 2008*
  - Introduced by: Wexler
  - Date Introduced: 4/23/08
  - Status: Read twice and referred to the House Committee on the Judiciary (4/23/08).
  - Related Bills: S. 2449
  - Key Provisions:
    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil

Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court makes findings of fact that: (A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or (B)(i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and (ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.
— Section 2 also provides: (1) there is a rebuttable presumption that the interest in protecting a person's financial, health, or other similar information outweighs the public interest in disclosure, and (2) the bill must not be construed to permit, require, or authorize the disclosure of classified information.]

— Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

SENATE RESOLUTIONS

- S.J. Res.

HOUSE RESOLUTIONS

- H.J. Res. 66 - *Proposing an Amendment to the Constitution of the United States to establish and protect the Rights of Victims of Violent Crimes*
  - Introduced by: Chabot
  - Date Introduced: 12/6/07
  - Status: Read twice and referred to the House Committee on the Judiciary (12/6/07).
  - Related Bills: None
  - Key Provisions:
    — The bill proposes an amendment to the Constitution providing for rights of crime victims.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May 9, 2008

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the Rules Committee Support Office to improve its support service to the rules committees.

Federal Rulemaking Website

We received, acknowledged, forwarded, and followed up on 115 comments submitted on the proposed amendments published for comment in August 2007. The comments are posted on the judiciary's Federal Rulemaking internet website at <http://www.uscourts.gov/rules/proposed0807-1.htm>.

The office continues to add rules-related records to the rules website. We have posted committee minutes and reports; committee agenda materials; information on legislation affecting the federal rules of practice, procedure, and evidence; and comments on proposed rules amendments published for public comment. The rules website, which was recently redesigned, continues to be one of the most popular sites on the judiciary's website. During the six-month period from October 1, 2007, to March 31, 2008, users viewed almost 1.8 million pages on the website.

Documentum

In May 2008, Professor Struve was given a demonstration of Documentum, the office's document-management system, and agreed to participate in a pilot project allowing remote access to the system. Professor Struve will be able to access thousands of rules documents in Documentum, including drafts of proposed rules amendments, committee minutes, committee reports, agenda items, comments and suggestions, memoranda, and correspondence. Among other things, the system will: (1) allow multiple users to prepare, edit, and finalize documents; (2) search for documents in the database using enhanced indexing and search capabilities; and (3) track different versions of documents to ensure the quality and accuracy of work products, which will facilitate the preparation and reformatting of agenda materials, committee minutes and

reports, and other rules-related documents. Upon successful completion of the project, we hope to expand the program to allow remote access to Documentum by committee members and reporters.

Committee and Subcommittee Meetings

For the period from December 2007, to May 2008, the office staffed eight meetings, including one Standing Committee meeting, five advisory committee meetings, a meeting of the informal working group on mass torts, and a Civil Rules subcommittee meeting. We also arranged and participated in numerous conference calls involving rules subcommittees.

Miscellaneous

Rules Approved by the Supreme Court. On April 23, 2008, the Supreme Court approved proposed amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, which were approved by the Judicial Conference at its March and September 2007 sessions. The amendments were transmitted to Congress and will become effective on December 1, 2008, unless Congress enacts legislation to reject, modify, or defer the amendments.

James N. Ishida

4.

Committee on Rules of Practice and Procedure
June 2008
Agenda Item Tab 4
Informational

The Federal Judicial Center is pleased to provide this report on recent and upcoming education and research activities that may be of interest to the Committee.

Highlights

Education. A major focus of Center activities at the beginning of 2008 was to help courts prepare for requests for the early release of inmates as the result of retroactive application of the U.S. Sentencing Commission's December 11, 2007, guideline amendment reducing offense levels for crack cocaine convictions, effective on March 3, 2008. In February, the Center made available three resources designed to assist district judges, probation officers, and court staff: two video programs, which were broadcast on the Federal Judicial Television Network and posted on FJC Online for viewing over the judiciary's intranet, *Using Bureau of Prisons Sentry Reports to Evaluate Sentencing Reductions* and *Sentencing in Federal Courts: Applying Gall, Kimbrough, and New Crack Cocaine Guidelines*; and a new FJC Online resource, the *Crack Cocaine Retroactivity Guideline Information Exchange.*

The new crack cocaine guideline amendment and related topics are also being addressed in the Center's National Workshops for District Judges and the 2008 National Conference for Chief Probation and Pretrial Services Officers. Offender re-entry issues will be the subject of a special-focus workshop for judges and will be included in the agendas of several programs for probation and pretrial services managers during the latter half of the year.

Two Center products provided additional information about the Crime Victims' Rights Act of 2004 (CVRA). A January FJTN broadcast describes the impact of the Act on the Federal Rules of Criminal Procedure, as well as the experiences of judges and other court personnel who have dealt with crime victims pursuant to the Act. A March 2008 update to the Center's 2005 paper, *The Crime Victims' Rights Act of 2004 and the Federal Courts,* was posted on FJC Online.

Research. The Center began work on six new research projects: (1) research to update the current bankruptcy case weights, requested by the Committee on the Administration of the

Bankruptcy System; (2) a study of the experiences in fives courts that are piloting public access to digital audio records of the courts via PACER, requested by the Court Administration and Case Management Committee and the Committee on Information Technology; (3) a survey of Federal-State Judicial Councils, requested by the Committee on Federal-State Jurisdiction; (4) an assessment of court practices regarding the inclusion of attorney fee costs in bond costs under Rule 7 of the Federal Rules of Appellate Procedure, requested by the Advisory Committee on Appellate Rules; (5) a study of sealed cases, requested by this Committee's Subcommittee on Sealed Cases; and (6) the design of a study of a sample of multidistrict litigation cases, recently requested by the Chair of the Judicial Panel on Multidistrict Litigation. The Research Highlights section of this report describes the status of these new undertakings, as well as the continued work on other major projects.

I. Education Highlights

The Center presents most judicial education through in-person workshops and seminars. Most staff education is offered through distance education programs that facilitate local attendance and give individual court units greater flexibility in selecting topics and requesting in-house training for their staff. The following pages list programs currently scheduled for calendar 2008.

A. Education for Federal Judges

1. Seminars and Workshops

Orientation programs for circuit, district, bankruptcy, and magistrate judges. The Center conducts orientation programs for judges on an as-needed basis to keep pace with nominations and appointments. Among the eight orientation programs scheduled this year was a new Orientation Program for U.S. Court of Appeals Judges conducted in February for 13 appellate judges confirmed in the past two years. The Center's Appellate Judge Education Advisory Committee suggested this program last fall. The Center will continue to fund new circuit judges' attendance at the one-week program for new appellate judges at New York University Law School's Institute of Judicial Administration.

Continuing education/multisubject workshops

- A national symposium for all court of appeals judges
- A national sentencing policy institute for appellate and district judges

- A conference for all chief district judges and three national workshops for all district judges
- A conference for all chief bankruptcy judges, as well as two national workshops and a new program, *The Current State of Capital Markets,* for all bankruptcy judges
- Two national workshops and a bail and retention issues workshop for magistrate judges

Special-focus seminars on law and law-related topics

- Ten special-focus workshops for all judges: Electronic Discovery (cosponsored with Georgetown Law School); Employment Law (cosponsored with NYU School of Law and its Institute of Judicial Administration); Intellectual Property (cosponsored with UC Berkeley Law School and its Center for Law and Biosciences); Law and Genetics (cosponsored with Stanford Law School); Law and Neuroscience (cosponsored with the Gruter Institute); Law and Society (cosponsored with Harvard Law School); Law and Terrorism (cosponsored with Duke Law School); Mediation Skills; the Medina Seminar on the Humanities and Science (cosponsored with Princeton University and the Judiciary Leadership Development Council); Offender Re-entry Issues (cosponsored with Duke Law School); and a Symposium on the Fortieth Anniversary of the Center (with Lewis & Clark Law School).

Programs for judges and senior court staff together

- Two executive team development workshops (one for district courts, one for bankruptcy courts)
- Four strategic planning workshops (two for district courts, two for bankruptcy courts)
- An executive seminar for chief district judges and court unit executives

2. In-court Programs

A variety of in-court programs for judges are available on request; the Center funds faculty travel to present the programs. The following programs are offered in 2008: Religion in the Early Republic; Improving the Writing and Editing of Opinions; Intellectual Property Cases

(with an emphasis on modern patent law); Law and the Holocaust; Law and Literature; and Financial Statements in the Courtroom.

3. Manuals and Monographs

The Center produced four publications: *Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers*; a new monograph on *ERISA in the Courts;* the *2007 Annual Report;* and a research report, *Trends in Summary Judgment Practice: 1975-2000.* These publications are also available in electronic form on FJC Online. Two other publications, an update to the Center's 2005 paper, *The Crime Victims' Rights Act of 2004 and the Federal Courts*, and *Patent Claim Construction: A Survey of Federal District Court Judges*, are available online only.

Works in progress include a monograph on major issues in Immigration Law and new editions of the *Manual on Recurring Problems in Criminal Trials* and *A Primer on the Jurisdiction of the U.S. Courts of Appeals.*

B. Federal Judicial Television Network (FJTN) and Video Programs for Judges and Staff

In addition to the programs discussed on page one of this report, the following new programs are on the Center's FJTN broadcast schedule:

- Fair Labor Standards Act Basics
- FOIA National Security and the D.C. Circuit: a Safeguard or a Sham?
- Reviews of key bankruptcy decisions in 2007 in the Eighth, Fourth, and Ninth Circuits (each in coordination with judges from those circuits)
- Substance Abuse: Monograph 109 Treatment Services
- Supreme Court: The Term in Review (2007–2008)
- The Basics of Employment Discrimination Law for Law Clerks (a new production)
- *Court to Court* (March, June, September, and December 2008 editions)

In addition to satellite broadcast over the Federal Judicial Television Network, most Center television programs are also available for viewing over the judiciary's intranet.

New or updated video programs (for use in orientations, seminars, and other educational programs) produced or in production include:

- *Evidence in the Federal Courts* (for district judge, magistrate judge, and bankruptcy judge Phase I Orientations)
- *Chapter 11, Discharge and Disability,* and *Office of the U.S. Trustee* (for bankruptcy judges)
- *Judicial Demeanor,* in cooperation with the American College of Trial Lawyers, (for all judges)

C. Education for Legal Staff

- An appellate staff attorneys workshop
- A staff attorneys conference
- Six federal defender programs: an orientation for assistant federal defenders; a national seminar, a sentencing workshop, and an appellate writing workshop for federal defenders; a seminar for federal defender investigators and paralegals; and a law and technology workshop for federal defender staff

D. Education for Court Staff

Seminars and Workshops

Continuing education/multisubject programs

Two biennial national conferences:

- A national conference for chief probation and pretrial services officers.
- A national conference for district court clerks, district court executives, and chief deputy clerks

Special-focus programs

- A leadership seminar for chief deputy clerks and deputy probation and pretrial services officers
- A team development workshop for circuit librarians and deputy circuit librarians
- Four workshops for managers and supervisors in clerks' offices–two programs for those new to the position and two programs for those with three or more years of experience
- A five-session Web conference workshop for new court trainers

- Facilitating three Administrative Office case management/electronic case files operational forums: one for bankruptcy courts, two for district courts
- An Administrative Office-Federal Judicial Center Automation Trainers Community Conference
- For probation and pretrial services officers
  - An executive team seminar for probation and pretrial services chiefs and deputy chiefs
  - An audio conference for new chief probation and pretrial services officers
  - A workshop for new deputy chief probation and pretrial services officers
  - A Phase II workshop for the ninth class of the Center's three-year Leadership Development Program for Probation and Pretrial Services Officers for supervisors and specialists at or above the CL-28 level
  - Two in-person workshops and five multisession Web Conference programs for new supervisors
  - A new workshop on treatment services implementation for probation and pretrial services specialists and managers
  - A five-session Web Conference program that will incorporate a video compilation of the Center's substance abuse FJTN series
  - A Professional Education Institute (PEI) workshop to help court managers use the Center's PEI in staff development, as well as several Web conferences to be scheduled throughout the year
- A concluding workshop for the sixth class of the two and one-half year Federal Court Leadership Program, the Leadership Development Program counterpart for other court staff

2. In-court and E-learning Programs

The Center develops curriculum packages comprising instructor and participant materials and, in most instances, trains court personnel to teach the programs locally and in courts nearby. Five train-the-trainers workshops have been scheduled this year to teach select court staff to facilitate one of the following curriculum packages: *Hertz Management Excellence Survey*–a court managers' program requested by 15 court units this year–and four new packages: *Dealing with Difficult Situations,* which helps supervisors manage employee relations; *Court Partners for*

Organizational Development Projects for managers; *Time Management* for all staff; and *Planning for Courtroom Technology.* The latter program was developed by the Center and the Administrative Office to help district court clerks best utilize their courts' new yearly allotment of courtroom technology funds.

In collaboration with the Administrative Office, the Center will facilitate approximately three *Managing a Capital Construction Project* programs for local districts.

Three new e-learning programs will be released or developed in 2008: *Court Community Outreach* (a court-customized adaptation of a Michigan State University program) for all staff, and *Is it Legal Advice?* (district and bankruptcy versions based on the Center's curriculum package). The Center's e-learning program on the Federal Rules of Bankruptcy Procedure for bankruptcy court staff and law clerks will be updated.

E. Other Education Initiatives

The Center is working with the Administrative Office and the Financial Accounting System for Tomorrow (FAS4T) Working Group to conduct a financial management training needs assessment, which will serve as the basis for:

> . . . the development of a comprehensive continuing education program that will assist new and existing court staff in their budget and financial management responsibilities. The training program would include both systems and functional training. In addition, various methods would be explored for delivering training, including face-to-face training, web-based training, computer-based training, videos, and the use of the Federal Judicial Television Network. (Summary of the Report of the Judicial Conference Committee on the Budget, September 2006, Court Financial Management Training Initiatives, page 15).

The Center will also provide presentation skills training for facilitators and faculty for the Administrative Office's September 2008 and March 2009 FAS4T Users Forums for all court units. Approximately 1,200 court staff are expected to attend the forums.

At the request of the Judicial Resources Committee, the Center is working with the Administrative Office and the Committee to develop educational programs concerning new benchmarks and new pay progression policies that were approved by the Judicial Conference in September 2007. Because the new policies will bring about major changes in compensation

policies and procedures throughout the courts, educating all employees will be essential. The educational efforts will include national meetings for court executives in October 2008, and programs to train trainers for every court to deliver training to supervisors and to employees during 2009. The Center is working closely with the Administrative Office to assess needs, develop plans and curricula, and deliver the necessary programs and materials.

II. Research Highlights

A. Major New Research Projects

New bankruptcy case weights. At the request of the Committee on Administration of the Bankruptcy System, the Center is finalizing plans to conduct a national study to update the bankruptcy case weights that have been in use since 1990. An earlier Center bankruptcy case weighting study was suspended in May 2005, after passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The study was suspended, at the recommendation of the Committee, to allow the courts to gain some experience with the provisions of BAPCPA. For the current study, which will start anew, the Center is pilot testing several modes of collecting data with a small number of bankruptcy judges. The actual data collection is scheduled to begin in May 2008. The study's design calls for each bankruptcy judge to record the time he or she devotes to cases and other judicial activities during one of five ten-week reporting periods spanning a year. The first data collection period began on May 26, 2008, and the last one ends about one year later in 2009. Approximately 75 bankruptcy judges will be assigned to each reporting period.

Other assistance to the Committee on Administration of the Bankruptcy System. At the request of the Bankruptcy Committee and in cooperation with staff of the Administrative Office's Bankruptcy Judges Division, Center staff are providing assistance to the Committee's Bankruptcy Forms Modernization Subcommittee as it plans for modernizing and updating the various bankruptcy forms.

At the request of the Bankruptcy Committee's Long-Range Planning Subcommittee, the Center developed a website for the subcommittee members and staff to collaborate the committee's long-range planning work.

At the suggestion of several bankruptcy judges, and with the concurrence of the Committee, the Center is designing a study of district practices in awarding attorney fees in Chapter 13 matters. The objective is to provide information that districts can use in assessing

and setting their policies regarding attorney fees. The Center will collect and compile basic information about practices regarding flat fees and what services they do and do not cover, as well as practices regarding how fees are paid. Our initial effort aims at identifying relevant local rules and general/standing orders that address the issue.

Evaluation of the pilot public access to digital audio court records via PACER. At the request of the Court Administration and Case Management Committee and the Committee on Information Technology, the Center has designed and is conducting an evaluation of a one-year pilot that provides online public access via PACER to audio transcripts in two district and three bankruptcy courts. The Center's evaluation focuses on usage and privacy issues that may arise from granting remote public access to audio recordings of court proceedings.

Survey of Federal-State Judicial Councils. As part of the Committee on Federal-State Jurisdiction's on-going effort to encourage avenues of cooperation between federal and state courts, the Center has been asked to collect information regarding active State-Federal Judicial Councils. These councils are regional bodies that bring state and federal judges together to identify common interests and problems and to identify solutions and opportunities for cooperation. The Center last surveyed State-Federal Judicial Councils for the Committee in 2000.

Study of proposed amendment to Rule 7 of the Federal Rules of Appellate Procedure concerning the treatment of attorney fees in bond costs on appeal. The Advisory Committee on Appellate Rules had been considering a split that exists between the circuits over whether attorney fees are among the costs for which a bond may be required, under Federal Rule of Appellate Procedure 7 "to ensure payment of costs on appeal." At its November 2007 meeting, the Committee decided that it may be useful to first obtain empirical data concerning the contexts in which Rule 7 bonds are currently required, and the frequency with which attorney fees are included when setting the amount of such bonds in circuits where the inclusion of such fees is permitted. The Center was asked to assist with an empirical study of the issues. The Center's report, *Federal Judicial Center Exploratory Study of the Appellate Cost Bond Provisions of Rule 7 of the Federal Rules of Appellate Procedure: Results of a Three District Exploratory Study* was presented at the Appellate Rules Committee's April 2008 meeting.

Sealed cases. The Standing Committee on Rules of Practice and Procedure has empanelled a subcommittee on sealed cases. The subcommittee had its first meeting on January 13, 2008. The subcommittee has now asked the Center to conduct research on the frequency and reasons for completely sealed cases. The study will examine sealed cases in the district courts, including both civil and criminal cases, the bankruptcy courts, and the courts of appeals.

B. Other Selected Center Research in Progress

Courtroom Use Study. In November 2007, the Center presented a preliminary draft report to the Court Administration and Case Management Committee and, at the Committee's request, to the liaisons from five other committees: Space and Facilities; Budget; Judicial Resources; Administration of the Bankruptcy System; and Magistrate Judges. As a follow-up, the Court Administration and Case Management Committee asked the Center to conduct some additional analyses. In early March 2008, the Center provided to Judge Tunheim, chair of the Committee, our preliminary findings from the additional analyses, along with our analyses of data from the three case study districts: the District of Minnesota, District of South Dakota, and the Southern District of New York. These districts were included in the study because at least some judges in each of the districts share courtrooms. The Center also provided to Judge Tunheim the preliminary results of our national survey of attorneys regarding courtroom use. Our next report is due to be presented to the Court Administration Committee and the five committee liaisons in early April 2008. Judge Tunheim provided to the Judicial Conference, at its March 2008 meeting, a report on the status of the study, including some of the basic results, and advised the Conference that his Committee would send recommendations to it at its September meeting. He suggested that the report would be made available to Congress shortly thereafter.

Judicial Implementation of the Crime Victims Rights Act of 2004. The Advisory Committee on Criminal Rules has been monitoring the district courts' implementation of the Crime Victims' Rights Act of 2004 (CVRA) to determine whether additional amendments to the Federal Rules of Criminal Procedure may be warranted. The Committee asked the Center to undertake a study of state court practices involving crime victims in those states that have crime victims legislation.

Processing of Habeas Corpus appeals of state capital convictions in the federal courts. The Center continues to assist the chairs of five Judicial Conference Committees (Federal-State

Jurisdiction, Criminal Law, Defender Services, Magistrate Judges, and Judicial Resources) as they examine the processing of capital habeas petitions filed by state prisoners in federal court. The chairs met in March and April 2008 at which the results of the research conducted by the Center and the Administrative Office were considered in light of the pending Department of Justice regulations establishing the process to certify states for expedited review of capital habeas petitions.

Impact of the Class Action Fairness Act of 2005 (CAFA) on the Resources of the Federal Courts. The Advisory Committee on Civil Rules, acting in consultation with the chairs of the Committees on the Rules of Practice and Procedure, Federal-State Jurisdiction, Judicial Resources, Court Administration and Case Management, and Bankruptcy Administration, asked the Center to conduct a thorough study of the impact of the Class Action Fairness Act of 2005 on the federal courts. The Center has completed the pre-CAFA study of filings and removals of class actions between July 1, 2001 and February 17, 2005. Those findings were briefly presented at the March 2008 meeting of the members of the Mass Torts Working Group.

III. Federal Judicial History and International Rule of Law Functions Highlights

Pursuant to a statutory mandate, the Center provides assistance to federal courts and others in developing information, and teaching about, the history of the federal judiciary.

Eight units of its "Federal Trials and Great Debates in United States History" project are available on the Center's sites on the courts' intranet and the Internet, with materials related to notable federal trials. This project, supported by grants to the Federal Judicial Center Foundation, can enhance community outreach programs and help educators incorporate federal trial court history into courses at the secondary and college levels.

Also available on line are three teaching modules designed for judges and court staff who wish to present students and other public audiences with historical information about the federal courts. The modules examine the constitutional origins of the judiciary, historical debates on judicial independence, and the establishment of a federal judiciary.

The "History of the Federal Judiciary" website remains one of the most frequently consulted government sites, with many links to it from legal education, judicial reform, and news organizations. Recent additions to the site include a collection of nearly 600 photographs of historic courthouses, a survey of judicial salaries since 1789, and histories of the U.S. circuit courts.

In compliance with another statutory mandate, the Center provides information about the United States courts to judiciaries of other countries through informational briefings for visiting delegations, the dissemination of Center publications, resources on its Internet site, and international technical assistance projects. The Center also gathers information about foreign judicial systems that will help the Center perform its other missions.

From September 16, 2007 through April 15, 2008, Center staff participated in 28 briefings, meeting with more than 250 judges, court officials, and lawyers from 27 different countries. Among the topics addressed in these meetings were the U.S. judicial system (delegations from Brazil, Bulgaria, China, and Iran); judicial education (Afghanistan, Albania, France, and Liberia); alternative dispute resolution (Argentina and Kenya), and jury trial procedures (Russia).

The Center continues to add resources to its new International Judicial Relations web page, accessible from the Center's intranet and internet sites, and is providing technical assistance during the development of a new website for the International Organization for Judicial Training, www.iojt.org.

Recent international assistance projects involving Center staff include the participation of Center Director, Judge Barbara Rothstein, in a training session for newly appointed judges and prosecutors at the Ecole Nationale de la Magistrature in Bordeaux, France, and continued work with the Russian Academy of Justice on a training course for court administrators. In May 2008 the Center will welcome Judge Abdul Saboor Hashimi from the Chamtal Court in Afghanistan as a Visiting Foreign Judicial Fellow.

5A.-B.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: **Judge Lee H. Rosenthal**
Standing Committee on Rules of Practice and Procedure

CC: **John K. Rabiej**

FROM: **Judge Marilyn L. Huff**
Catherine T. Struve

DATE: **May 16, 2008**

RE: **Time-Computation Project**

We write on behalf of the Time-Computation Subcommittee to report on the progress of the Time-Computation Project. As you know, the project centers upon a proposed template for an amended time-computation rule. The template's principal simplifying innovation is its adoption of a "days-are-days" approach to computing all periods of time, including short time periods. Under the current rules, intermediate weekends and holidays are omitted when computing short time periods but included when computing longer periods. By contrast, under the template rule, intermediate weekends and holidays are counted no matter the length of the specified period.

The Advisory Committees have now approved amendments that adopt the template rule as part of the Appellate, Bankruptcy, Civil and Criminal Rules. (The example chosen as the template rule, Civil Rule 6(a), is enclosed.) They have also approved amendments to Rule-based time periods in order to offset the shift to a "days-are-days" approach. Those proposed amendments are now before the Standing Committee for final approval. The Advisory Committees have also compiled a list of statutory periods that are priorities for legislative amendment to offset the effect of the Rules' shift in time-computation approach. That list, too, is now before the Standing Committee for approval.

Part I of this memo summarizes the Time-Computation Subcommittee's recommendations and requests. Part II recounts developments in the Project since the Standing Committee's January 2008 meeting. Part III summarizes the public comments on the time-computation project and the Subcommittee's discussions concerning those comments. Part IV discusses the need to seek amendment of selected statutory time periods and the need to pursue changes in affected local rules.

I. Summary of recommendations and requests

Final approval of proposed amendments to the Appellate, Bankruptcy, Civil and Criminal Rules. As you know, the proposed time-computation amendments to the Appellate, Bankruptcy, Civil and Criminal Rules were published for comment in August 2007. The proposed amendments adopt the time-computation template and adjust the Rules' short deadlines in order to account for the proposed change in time-computation approach. After considering the comments submitted, the relevant Advisory Committees voted this spring to give final approval to these proposed amendments. (A few changes were made after publication to some of the rule-based time periods; those changes are detailed in the reports of the relevant Advisory Committees.) The Time-Computation Subcommittee recommends that the Standing Committee give final approval to the proposed amendments as detailed in the Advisory Committee reports. The Subcommittee's views on the Rules amendment packages are discussed in Part IV below.

Effective date of proposed Rules amendments. Participants and commentators have stressed the importance of ensuring that all necessary statutory and local rules amendments take effect at the same time as the changes in the national time-computation Rules. The Subcommittee concurs in that view, and Part III discusses our efforts to ensure that all necessary changes are timely made. We recommend proceeding on the assumption that the project will stay on track to take effect December 1, 2009.

Approval of list of statutory deadlines. Each of the relevant Advisory Committees voted this spring on a list of statutory periods that are priorities for legislative amendment. The purpose of such amendments will be to ensure that the shift to a days-are-days time-computation approach does not cause hardship or thwart statutory purposes. As you know, we are in the process of securing input from potentially interested groups on the question of the proposed statutory amendments. The goal is to secure passage of legislation that will amend the listed statutory periods, with the same effective date as the proposed Rules amendments. These issues are discussed in Part III.A. below. Subject to any comments received from potentially affected groups prior to the Standing Committee meeting, we recommend that the Standing Committee consider and approve the list of statutory provisions that are priorities for legislative amendment.

Coordination with local rulemaking bodies. Participants and commentators have also stressed the importance of coordinating with local rulemakers to ensure that the local rules conform to the new time-computation approach as of the date that the national Rules amendments take effect. To that end, we are undertaking a pilot study of the local rules in

selected locations so as to gauge the likely number of affected provisions and the best means for assisting local rulemaking bodies in identifying and (if necessary) amending affected local rules provisions. We discuss local rulemaking issues further in Part III.B. below.

II. Recent developments

Subcommittee consideration of public comments. As you know, versions of the template rule were published for comment as proposed amendments to Appellate Rule 26(a), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a). Also published for comment were proposed amendments to numerous deadlines set by the Appellate, Bankruptcy, Civil and Criminal Rules; the goal of those amendments is to offset the effect of the change in time-counting approach by lengthening most short rule-based deadlines.

In publishing the time-computation proposals for comment, we drew the attention of the bench and bar to three issues in particular. First, we solicited input on the proposed time-computation rules. Second, we noted that the shift to a days-are-days approach will be almost entirely offset – as to rule-based periods – by amendments that lengthen most short rule-based deadlines. Third, we pointed out that the new time-computation rules will govern a number of statutory deadlines that do not themselves provide a method for computing time, and we solicited input concerning key statutory deadlines that the Standing Committee should recommend that Congress lengthen in order to offset the change in time-computation approach.

We received a total of some 22 comments that are relevant to the time-computation project as a whole. The public comment period closed February 15, 2008. The Time-Computation Subcommittee held two conference calls in February 2008 to discuss the comments. As to a few issues (such as those discussed in Part III.C.1) the Subcommittee continued its deliberations by email. The public comments and the Subcommittee's reactions to them are discussed in Part III of this memo. In summary, the Subcommittee carefully considered all the comments but decided not to recommend any changes to the template time-computation rule or its note.

Spring 2008 Advisory Committee meetings. At their spring 2008 meetings, the Appellate, Bankruptcy, Civil and Criminal Rules Committees gave final approval to the time-computation rule and to the corresponding amendments to rule-based time periods. Apart from the correction of a typographical error in the text of proposed Bankruptcy Rule 9006(a),[1] the time-computation rules were approved as published. A few changes in the rule-based time periods were made subsequent to publication, and those changes are discussed in the reports of the relevant Advisory Committees. The four Advisory Committees also approved lists of statutory time periods (relating to their fields of expertise) that are priorities for amendment by

[1] In Bankruptcy Rule 9006(a)(3)(A), the reference to Rule 6(a)(1) was changed to Rule 9006(a)(1).

Congress in the light of the shift to a days-are-days time-counting approach; those lists are discussed in Part IV.A. below.

Ongoing work on statutory time periods and local rules time periods. Once all the Advisory Committees met and approved lists of statutory periods that are priorities for amendment, it became possible to compile a complete list of the periods that the Advisory Committees recommend for legislative amendment (see Part IV.A). Having done so, we are now in the process of seeking comment on that list from potentially interested groups. The goal is to obtain as much input as possible on the proposals so as to assure decisionmakers in the rulemaking process and in Congress that the proposed legislative amendments are technical and noncontroversial.

The other major task for the Time-Computation Project is to encourage and assist local rulemakers in responding to the upcoming effective date of the new national time-counting rules. The Administrative Office will provide each local rulemaking body with information on potentially affected local rules provisions and will provide suggestions on how to amend any affected provisions to accord with the new time-computation approach. The AO will point out, for example, that any local rules provisions that set time periods in "business days" would be incompatible with the new days-are-days time-counting approach and should be amended.

III. Statutory deadlines and local rules deadlines

The major outstanding tasks in connection with the time-computation project concern the changes that will be necessary in certain time periods set by statutes or by local rules.

A. Statutory deadlines

Current Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) explicitly apply to statutory time periods. Prior to the 2002 restyling, Criminal Rule 45(a) covered "any period of time"; Rule 45(a) now governs "any period of time specified in these rules, any local rule, or any court order." Under the template's proposed approach, Criminal Rule 45(a) would once again apply to statutory periods. There are more than 170 statutory time periods that could theoretically be affected by the proposed shift in the Rules' time-computation approach. The universe of statutory provisions to which existing caselaw has applied the time-computation Rules, however, is smaller. And within that smaller universe, not all the provisions will necessarily require amendment in order to avoid hardship to the bar. When the time-computation project was published for comment, the AO provided a link where the public could peruse the spreadsheet that contains the full list of statutory provisions of which we are aware. Few

comments specifically addressed the time-computation amendments' likely effect on any particular statutory periods.[2]

At their spring 2008 meetings, the four Advisory Committees each compiled a list of the statutory periods that they consider to be priorities for amendment. The resulting combined list is as follows. The list is roughly ordered by code provision, but that ordering has been altered to group related provisions together. Bankruptcy-related provisions are listed first, followed by provisions relating to criminal practice and then by provisions relating to civil practice.

- In the following bankruptcy-related statutes, the noted **5-day** periods should be changed to **7-day** periods:
  - 11 U.S.C. § 109(h)(3)(A)(ii)
    - **Five-day** period concerning debtor's unsuccessful attempt to obtain credit-counseling services.
  - 11 U.S.C. § 322(a)
    - **Five-day** period within which trustee must file bond.
  - 11 U.S.C. § 332(a)
    - **Five-day** deadline for United States trustee to appoint consumer privacy ombudsman.
  - 11 U.S.C. § 342(e)(2)
    - If a creditor specifies an address at which it desires to receive notice in a chapter 7 and 13 case of an individual debtor, that address must be used by the court and the debtor for any notice required to be provided the creditor later than **five days** after the court and debtor receive the creditor's notice of address.
  - 11 U.S.C. § 521(e)(3)(B)

---

[2] An exception was the comment submitted by Richard J. Osterman, Jr., Acting Deputy General Counsel of the Litigation Branch of the Federal Deposit Insurance Corporation, who, as noted in Part III.D., urges that Congress *not* be asked to amend the time periods set in certain provisions of the Federal Deposit Insurance Act.

More importantly, as noted above, in late March Jonathan Wroblewski provided the Criminal Rules Committee with a memo listing criminal statutory provisions that the DOJ believes are the highest priority for amendment in the light of the new time-computation approach.

- If a creditor in a Chapter 13 case files a request to receive a copy of the plan filed by the debtor, the court shall make a copy of the plan available to such creditor not later than **5 days** after such request is filed.

o 11 U.S.C. § 521(i)(2)

- Provides for dismissal, in certain cases, if an individual debtor fails to file required information within 45 days after filing of the petition; and provides that if a party in interest requests such an order of dismissal, the court shall (subject to certain other provisions) enter the order of dismissal not later than **5 days** after such request.

o 11 U.S.C. § 704(b)(1)(B)

- With respect to individual debtors in cases under Chapter 7, United States trustee shall review debtor's filings and file a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and the court shall provide a copy of the statement to all creditors not later than **5 days** after receiving it.

o 11 U.S.C. § 764(b)

- With respect to commodity broker liquidations, limits trustee's ability to avoid certain transfers of commodity contracts made before **five days** after the order for relief.

o 11 U.S.C. § 749(b)

- With respect to stockbroker liquidations, limits trustee's ability to avoid certain transfers of securities contracts made before **five days** after the order for relief.

- Certain timing provisions applicable to the period between a criminal defendant's initial appearance and the preliminary hearing (and related provisions concerning that phase of a prosecution) should be changed **from 10 to 14 days**:

o 18 U.S.C. § 3060(b): preliminary examinations, except in certain circumstances, "shall be held . . . no later than the **tenth day** following the date of the initial appearance of the arrested person."

- 18 U.S.C. § 983(j)(3): a temporary restraining order with respect to property against which no complaint has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

- 18 U.S.C. § 1467(c): a temporary restraining order with respect to property against which no indictment has yet been filed "shall expire not more than **10 days** after the date on which it is entered."

- 18 U.S.C. § 1514(a)(2)(C): a temporary restraining order "prohibiting harassment of a victim or witness in a Federal criminal case" shall not remain in effect more than "**10 days** from issuance."

- 18 U.S.C. § 1963(d)(2): a restraining order, injunction, or "any other action to preserve the availability of property . . . shall expire not more than **ten days** after the date on which it is entered."

- 21 U.S.C. § 853(e)(2): "a temporary restraining order under this subsection . . . shall expire not more than **ten days** after the date on which it is entered."

- The **four-day deadlines** in the Classified Information Procedures Act ("CIPA") § 7(b) and in the material-support statute, 18 U.S.C. § 2339B(f)(5)(B), should be amended to specify that **intermediate weekends and holidays are excluded**.

  - 18 U.S.C. § 2339B(f)(5)(B)(iii)(I): if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals-- (I) shall hear argument . . . not later than **4 days** after the adjournment of the trial; . . . ."

  - 18 U.S.C. § 2339B(f)(5)(B)(iii)(III): if an appeal is taken under 18 U.S.C. § 2339B (statute against providing material support or resources to designated foreign terrorists), "the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals--(III) shall render its decision not later than **4 days** after argument on appeal . . . ."

  - 18 U.S.C. App. 3 § 7(b)(1): in an appeal pursuant to the CIPA statute, "the court of appeals shall hear argument . . . within **four days** of the adjournment of the trial."

  - 18 U.S.C. App. 3 § 7(b)(3); in an appeal pursuant to the CIPA statute, the court of appeals "shall render its decision within **four days** of argument on appeal."

- The deadlines in the material-support statute and in CIPA for taking a pre-trial appeal should be changed **from 10 to 14 days**.

  - 18 U.S.C. § 2339B(f)(5)(B)(ii) provides that "[i]f an appeal is of an order made prior to trial, an appeal shall be taken not later than **10 days** after the decision or order appealed from, and the trial shall not commence until the appeal is resolved."

  - 18 U.S.C. App. 3 § 7(b) provides that "[p]rior to trial, an appeal shall be taken within **ten days** after the decision or order appealed from and the trial shall not commence until the appeal is resolved."

- The **two-day** notice provision in 18 U.S.C. § 1514(a)(2)(E) should be amended to **exclude weekends and holidays**.

  - 18 U.S.C. § 1514(a)(2)(E) provides that "if on **two days** notice to the attorney for the Government . . . the adverse party appears and moves to dissolve or modify [a] temporary restraining order, the court shall proceed to hear and determine such motion . . . ."

- The **10-day** notice deadline in 18 U.S.C. § 2252A(c) should be changed to **14 days**.

  - Under 18 U.S.C. § 2252A(c) a defendant seeking to utilize select affirmative defenses against charges of child pornography must notify the court "in no event later than **10 days** before the commencement of the trial." Extending the time for notification to 14 days will conform to the times provided for notice of other defenses. The Criminal Rules Committee has proposed extending the period for such notice under Rule 12.1 (alibi defense) and Rule 12.3 (public-authority defense) to 14 days.

- The **three-day** period set by 18 U.S.C. § 3432 should be amended to **exclude weekends and holidays.**

  - Under 18 U.S.C. § 3432 "a person charged with treason or other capital offense shall at least **three entire days** before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial."

- The **five-day** deadline for applications under 18 U.S.C. § 3509(b)(1)(A) should be changed to **7 days**.

  - 18 U.S.C. § 3509(b)(1)(A) provides that a person seeking an order for a child's testimony to be taken via 2-way closed circuit video "shall apply for such an order

at least **5 days** before the trial date." Extending this period to 7 days will permit adequate time for the party against whom the child would testify to file any objections, and for the court to rule on the request.

- The **10-day** mandamus petition deadline in the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(d)(5), should be changed to **14 days**.

  - 18 U.S.C. § 3771(d)(5) sets a **10-day** time period for victims to seek mandamus review in the court of appeals for certain purposes. Under the proposed amendment to FRAP 4(b), the defendant's time to appeal would also be extended from 10 to 14 days, so there would be no conflict between the two periods.

- The **10-day** period in 28 U.S.C. § 636(b)(1) should be changed to **14 days**.

  - Section 636(b)(1) sets the period for objecting to magistrate judge orders and recommendations at **10 days**. Proposed Rules 72(a) and (b) extend the time from 10 days to 14 days, recognizing that under the present computation method 10 days has always meant at least 14 calendar days. Section 636(b) should be amended to allow 14 days so that statute and rule continue to operate in harmony.

- The "**not less than 7" day** period in 28 U.S.C. § 1453(c)(1) should be changed to "**not more than 10" days**.

  - This period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order; "not less than" was clearly a drafting error. Section 1453 should be amended to set the time limit at "not more than 10 days" to correct the drafting error and offset the shift in time-computation method.

- The **7-day** deadline in 28 U.S.C. § 2107(c) should be increased to **14 days**.

  - This period, which constitutes one of the time limits on making a motion to reopen the time to appeal in a civil case, should be extended **from 7 to 14 days** in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(B). The Appellate Rules Committee suggests choosing 14 days as opposed to 10 days, in keeping with the time-computation project's preference for periods that are multiples of 7 days. Lengthening the time period to 14 days would not unduly threaten any principle of repose; a party that wishes to be confident about the expiration of appeal time can protect itself by giving notice of the judgment to other parties.

At this time, we are in the process of seeking comment from potentially affected groups concerning the proposed changes included on this list. Subject to the input received from those

groups, we recommend that the Standing Committee consider and approve this list of statutory periods for recommendation to Congress.

B. Local rulemaking

It will also be important to raise awareness of the impending change in time-computation approach among the entities that are responsible for local rulemaking. The shift in time-computation approach may cause hardship if time periods set in local rules are not adjusted accordingly. Thus, local rulemakers should be alerted to review (and, where appropriate, lengthen) short time periods in their local rules, and should also be encouraged to ensure that the local rules do not direct that time be counted in a manner inconsistent with the new national rules (e.g., by using business days).

In addition, local rulemakers should be encouraged to give particular attention to the treatment of inaccessibility of the clerk's office, especially with respect to electronic filing; though the time-computation project has not attempted to address this issue in the time-computation rules, we are aware that members of the bar desire clarity and certainty in this area.

IV. Subcommittee discussions concerning public comments

This Part discusses issues raised by the comments on the time-computation project, and summarizes the Subcommittee's reactions to those issues. Part IV.A. discusses the varying views expressed concerning the project's overall advisability, and notes the Subcommittee's view that the project should proceed. Part IV.B. discusses the timing of the project. Part IV.C. explains the Subcommittee's conclusion that no changes to the template Rule or Note are warranted in the light of the public comments. Part IV.D. summarizes the public comments submitted on the time-computation project as a whole.

A. Overall advisability of project

The following commentators commented favorably on the time-computation project overall:

- Chief Judge Frank H. Easterbrook.
- Walter W. Bussart.
- Jack E. Horsley.
- Public Citizen Litigation Group.

- The State Bar of California's Committee on Appellate Courts.

The following commentators commented unfavorably.

- The Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").

- The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee").

  - The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the EDNY Committee.

- Professor Alan N. Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006.

- Richard Levin writes on behalf of the National Bankruptcy Conference ("NBC"), which "strongly endorses and supports" the comments submitted by Professor Alan Resnick.[3]

Commentators who oppose the project predict that the proposed change in time-computation approach will cause disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. They believe that the current time-counting system works well.[4] They note that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either.

Subcommittee members reviewed with care the arguments leveled against the time-computation proposals. Members observed, however, that these were the same objections that had been made – and rejected – during the Advisory Committees' earlier consideration of the proposed template. The Subcommittee's consensus was that it makes sense to proceed with the project, subject to the considerations discussed in Part III.B. below.

---

[3] The NBC also warns that the proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests "that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further ...."

[4] To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.

B. Statutory deadlines, local rules deadlines, and the timing of project's implementation

Several commentators (1) urge strongly that statutory and local rules deadlines must be adjusted in order to offset the shift to a days-are-days approach, and (2) also urge that the new time-computation rules' effective date must be delayed until those tasks are accomplished.[5]

1. Statutory and local rules deadlines

Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the goals of the time-computation project, but also to express strong concerns "about the interplay of the proposed amendment with both existing statutory periods and local rules." The DOJ argues that "changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable." Otherwise, the DOJ fears that the purposes of some statutes "may be frustrated." The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create "confusion and uncertainty" to have two different time-counting regimes (one for rules and one for statutes).[6]

The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.

The Subcommittee takes seriously the comments that stress the necessity for changes in periods set by statute or by local rule. In early spring 2008, the Subcommittee asked each Advisory Committee to compile and approve a list of the statutory time periods that will require amendment. Subcommittee members did not reach complete consensus on the approach that should be taken in compiling the list. At least one Subcommittee member stressed the importance of including all affected statutory time periods (except for any that might be deemed controversial). Other participants in the Subcommittee deliberations, however, took the view that the goal should be to compile a relatively short list of the provisions that are most likely to

---

[5] Alexander J. Manners proffers several suggestions for guiding the local rules amendment process.

[6] Mr. Morford's letter does not specifically state the DOJ's position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. However, on March 29, 2008, Jonathan Wroblewski, the Director of the Office of Policy and Legislation in the Criminal Division of the DOJ, provided the Criminal Rules Committee with a memo listing criminal statutory provisions that the DOJ believes are the highest priority for amendment in the light of the new time-computation approach.

cause problems if not lengthened to offset the shift in time-computation approach; this was the approach followed by the Advisory Committees at their spring meetings.

2. Timing of project's implementation

As noted above, the DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules. Likewise, Robert M. Steptoe, Jr., a partner at Steptoe & Johnson, urges that the time-computation proposals "not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification." Similarly, Alex Luchenitser of Americans United for Separation of Church and State urges that "local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes."

The Subcommittee agrees that the effective date of the Rules should be chosen so as to allow time for the necessary statutory and local rules changes.

3. Timing possibilities

The Subcommittee discussed possible ways to adjust the time-computation project's timing to address these concerns. The further progress of the package of time-computation amendments depends upon the understanding that Congress will pass legislation lengthening a number of statutory deadlines. If the time-computation project were to go forward as planned, the Rules amendments would be on track to take effect December 1, 2009. As of the Subcommittee deliberations in early spring 2008, the ability to stay on the December 1, 2009 track depended in part on events that had not yet occurred (including the need to compile and obtain input on the list of short statutory time periods that require amendment). Because there was at the time some uncertainty as to whether the Advisory Committees would be in a position to complete the necessary work at their spring 2008 meetings, the Subcommittee discussed two alternate timing possibilities. One would be to ask the Standing Committee to hold the package of time-computation amendments until June 2009. Another would be to include effective date provisions that make the time-computation rule amendments not effective until some time after Congress passes appropriate legislation or until December 1, 2010 (so as to afford more time for conforming legislation and local rule changes).

The Subcommittee did not discuss the alternative timing options in detail. Instead, the Subcommittee concluded that the best approach, for the moment, was to move ahead on the

assumption that the project will stay on track to take effect December 1, 2009. That approach seems all the more appropriate now, because at their spring 2008 meetings each of the four Advisory Committees was able to reach a decision on its list of statutory candidates for amendment.

C. Substantive issues relating to the project's implementation

As noted above, the Subcommittee recommends no changes to the language of the proposals as published. Before reaching that conclusion, the Subcommittee discussed two possible changes which some members of the Subcommittee would have supported; those possible changes are discussed in Part III.C.1. Other suggestions made by commentators, and rejected by clear consensus of the Subcommittee, are discussed in Part III.C.2.

1. Possible changes discussed, but ultimately not adopted, by the Subcommittee

Alternate time-counting methods set by local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days. The Subcommittee disagrees with the EDNY Committee's recommendation, and believes that the national time-computation rules should trump contrary time-computation approaches in the local rules.

The ABCNY Bankruptcy Committee suggests, among other problems, that "some local courts might decide to retain the present computational approach through the promulgation of local rules," which would compound the resulting confusion. The Subcommittee's discussion of this comment underscored participants' view that it is important that the Committee Note make clear the national rules' effect on local time-counting provisions.

The Note already states that local rules "may not direct that a deadline be computed in a manner inconsistent with" the national time-computation rules. The Subcommittee discussed whether it would be useful to provide further clarification. At least one Subcommittee member feels that such clarification would be useful. However, the Subcommittee was not able to formulate clarifying language that would not itself raise additional problems. The language first considered by the Subcommittee is shown below (new material is underlined; Appellate Rule 26(a) is used here for illustrative purposes):

> **Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or

a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). Thus, for example, a local rule should not set a time period in "business days," because subdivision (a) directs that one "count every day, including intermediate Saturdays, Sundays, and legal holidays." A local rule providing that "[r]eply papers shall be filed and served at least three business days before the return date" should be amended. Until then, it should be applied, under subdivision (a), as though it refers to "three days" instead of "three business days."

During the Subcommittee's discussion of this possible addition, a participant voiced unease with the proposed change. He noted that "[t]he new sentences target a transitional problem that should be eliminated soon," and that "Committee Notes are permanent and do not ordinarily refer to transitional problems, whose permanent status might only confuse a future reader when all the local rules have been amended." He cautioned:

> [M]y major concern with the three additional sentences is the implication that the rules committees have the authority to construe a local rule in a certain way, e.g., until the local rules are changed they should be read to mean "three days." The rules committees have no authority to interpret local rules. The circuit judicial councils determine whether a local rule is consistent with the federal rules (28 U.S.C. section 331(d)(4).) When we renumbered the rules, we faced a similar issue with requiring parallel local rules. But in that case, we amended the rule directly to provide that local rules must conform with the renumbering system. We could do that here, but I believe that is unnecessary as the courts will amend their local rules to comply with the law.
>
> The last sentence of the original Committee Note seems clear and sufficient to me. "In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a)." I do not believe that the next three sentences are necessary, particularly because we will send a notice to every court advising them of the new rule and their responsibility to amend the local rules consistent with the law. We will monitor their actions and send follow-up notices, if necessary. The added three sentences carry no more weight than these notices and may be viewed by some in the wrong light. If we believe that the "business day" issue must be addressed, I would suggest adding something like the following in lieu of the three sentences: "The rule is intended to make clear that time periods cannot be counted using "business days," because subdivision (a) directs that "one count every day, including intermediate Saturdays, Sundays, and legal holidays." Even this revised sentence may not be necessary, because our notices to the courts will make the point clear.

In the light of this input, and because a majority of Subcommittee members failed to voice support for the proposed change to the note to subdivision (a)(1), the Subcommittee is not recommending such a change.

State holidays. Alexander Manners, a vice president of CompuLaw LLC, proposes that Civil Rule 6(a)(6)'s definition of the term "legal holiday" be changed so that (a)(6)(B) reads "any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court." He makes this suggestion out of concern that, otherwise, litigants will be confused as to whether a state holiday counts as a "legal holiday" for time-computation purposes in instances when the federal district court fails to close on that day, or when it closes only for some purposes, or when it closes but fails to give timely notice of the closure.

The fact that the federal courts do not always close on state holidays has been discussed in the Advisory Committees' consideration of the time-computation proposals; despite the fact that federal courts do not always close, it was deemed important to count state holidays as legal holidays, given that – among other things – state and local government offices (including those of state and local government lawyers) are likely to be closed on state holidays. Under the clear text of the proposed Rule (and also under the text of the current Rule), state holidays count as legal holidays.

The Subcommittee discussed the fact that with respect to forward-counted deadlines, including state holidays within the definition of "legal holiday" serves as a safe harbor: A party who assumes the state holiday *is* a legal holiday will be protected from missing a deadline, while the worst that happens to a party who doesn't know the state holiday counts as a legal holiday is that the party thinks their deadline is a day earlier than it really is.

However, the Subcommittee noted that with respect to backward-counted deadlines, the state-holiday provision as currently drafted could pose a trap for the unwary. Imagine a case in which the backward-counted period (e.g., a requirement that a litigant file or serve reply papers five days before a hearing) ends on a state holiday on which the federal courts do not close. In such an instance the unwary practitioner may file or serve on the state holiday, not realizing that because that day counts as a legal holiday for time-counting purposes, the backward-counted deadline actually fell the day *before* the state holiday. In the light of the arcane nature of some state holidays, the Subcommittee thought it might be worthwhile to eliminate this potential trap. The Subcommittee therefore discussed the possibility of amending subdivision (a)(6)'s definition of "legal holiday." The blacklined excerpt below shows the possible alteration compared to the published version (using Appellate Rule 26(a)(6) for illustrative purposes):

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence

Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; ~~and~~

(B) any other day declared a holiday by the President~~;~~ or Congress;~~or~~ and

(C) for periods that are measured after an event, any other day declared a holiday by the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office. (In this rule, 'state' includes the District of Columbia and any United States commonwealth, territory, or possession.)

The Note to subdivision (a)(6) would then be expanded to explain the significance of subdivision (a)(6)(C). The first attempt at drafting such an expanded Note is shown below:

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, *see Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001").

For forward-counted periods – i.e., periods that are measured after an event – subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. Take, for example, Monday, April 21, 2008 (Patriots' Day in the relevant state). If a filing is due 10 days after an event, and the tenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 10 days before an event, and the tenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday -- no earlier than Tuesday, April 22.

Subdivision (a)(6)(C) defines the term "state" – for purposes of subdivision (a)(6) – to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Two attorney members of the Subcommittee voiced unease with this approach. As one of them commented:

> I appreciate the risk that, instead of being a safe harbor as it is for forward-counting rules, [the treatment of state holidays with respect to backward-counted deadlines] could be a trap for the unwary. But I wonder how often that will come up, especially because out-of-state lawyers probably will have local counsel who will be aware of the situation. And if it does, I wonder whether judges can take care of it on a case-by-case basis where a party seeks an extension nunc pro tunc .... On the other hand, I worry that the difference between state holidays for forward- and backward-counting rules will simply be, and appear to be, too complicated, particularly in the context where the whole concept of backward-counting time computations is new and has proven to be less than completely intuitive.
>
> I'm reinforced in that concern by the proposed committee note .... [T]he example is that Patriot's Day "counts as a legal holiday" [for forward-looking rules], but "the fact that [Patriot's Day] is a state holiday does not make [it] a legal holiday for purposes of computing this backward-counting deadline." Huh? I think most people, and even most lawyers, would scratch their heads -- the same day either is or is not a legal holiday under the Rules. This complexity ... gives the appearance of a Rube Goldberg contraption.

Likewise, during a discussion of the time-computation project by the Appellate Rules Committee's Deadlines Subcommittee, at least one member of that Subcommittee voiced strong agreement with these concerns about the complexity of this proposed change.

Notwithstanding these concerns, one Time-Computation Subcommittee member continues to feel that the change is worth attempting. As he explains:

> [T]here is a good reason for distinguishing between forward-counting and backward counting in the treatment of non-federal holidays: avoiding traps for the unwary. By excluding the holiday if it falls on the last day of a forward-counted deadline, we give an extra day to the practitioner who may have thought that the federal courts were closed that day. By including the holiday in a backward-counted deadline, we allow a practitioner--knowing that the federal

courts are in fact open on a state holiday--to file timely on the holiday itself rather than the day before. This rationale, which I find compelling, makes the counting rule as now proposed both consistent and intelligible.

This member suggested changing the proposed additional Note language to make this rationale more explicit, as follows:

> For forward-counted periods--i.e., periods that are measured after an event--subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. In each situation, the rule protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday, would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Since the federal courts will indeed likely be open on state holidays, there is no reason to require the earlier filing.

In short, thoughtful considerations were voiced on both sides. But the net result of the discussion is that a majority of Subcommittee members failed to voice support for the proposed change to subdivision (a)(6). Accordingly, the Subcommittee is not recommending such a change.

2. Other comments as to which the Subcommittee recommends no change

End of "last day": 11:59 p.m. versus 12:00 midnight. Stephen P. Stoltz argues that the time-counting rules should define the "last day" as ending "at 11:59:59 p.m." rather than "at midnight." He suggests this because "[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time." He warns that if the time-counting rules provide that the "last day" of a period ends "at midnight," there will be confusion and courts may conclude that a "deadline is actually the day (or evening) before the particular day."

Similarly, the ABCNY Bankruptcy Committee suggests that "'[m]idnight' is often defined as 12:00 a.m., or the beginning of a given day." Thus, the Committee "believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day."

It is unclear whether these commentators are correct in assuming that most people believe that days begin at midnight and end at 11:59 p.m.[7] – as opposed to believing that days begin at 12:01 a.m. and end at midnight. The Oxford Reference Dictionary of Weights, Measures, and Units does provide some support for the "11:59 p.m." view; it defines "p.m." as follows:

> PM, p.m. [post meridian, i.e. after meridian] time Indicative of a time after noon, i.e. after the Sun has nominally crossed the meridian, so the time is after the meridian. Thus 12:30 p.m. identifies the moment 30 minutes after noon. Similarly 12:30 a.m. identifies the moment 30 minutes after midnight. Technically 12:00 can be neither a.m. nor p.m.; it should be qualified as midnight else as noon, when the number can be just 12. (The 24-hour clock avoids all qualification, whether by a.m. else p.m., or by noon else midnight. Its ambivalence is whether to have midnight as 24:00 in the day it ends, else 00:00 in the day it initiates; the latter is preferable.) ....[8]

On the other hand, a number of districts' local rules concerning electronic filing provide evidence for the contrary view, in the sense that they refer to requirements that filings be made "prior to [or before] midnight" *on the due date* – evincing a view that midnight on the due date means the middle-of-the-night hour that *concludes* (rather than *commences*) the day of the due date.

Subcommittee members considered the argument for changing "midnight" to "11:59:59 p.m.," and concluded that such a change is not worthwhile. To find subdivision (a)(4)'s references to "midnight" confusing, a reader would have to read subdivision (a)(4) as stating that (for electronic filers) the "last day" of a period ends at the very moment it begins – which would seem to be a facially absurd reading.

End of "last day": non-electronic filings. Judge Philip H. Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers.

---

[7] Mr. Stoltz advocates the use of the term "11:59:59 p.m.," evidently to make the counting unit seconds rather than minutes. For purposes of simplicity, this memo will refer to "11:59 p.m."

[8] A Dictionary of Weights, Measures, and Units (Donald Fenna ed., Oxford University Press 2002) (emphasis added), available at <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t135.e1103>.

Both the text and Note of the proposed rule permit the adoption of local rules that permit the use of a drop-box up to midnight. Subcommittee members believe this adequately addresses the concern identified by Judge Brandt.

Exclusion of date-certain deadlines. Carol D. Bonifaci correctly observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., "no later than November 1, 2008") is not covered by the proposed time-computation rules. She suggests that this should also be stated in the text of the proposed Rules.

The Subcommittee's view is that no change in the Rule text is needed. The proposed time-counting rules, like the existing time-counting rules, refer to "computing" periods of time, and no computation is needed if the court has set a date certain. Admittedly there is (as the proposed Committee Note observes) a circuit split on this question, but the circuit split is addressed (and laid to rest) in the Note.

Backward-counted deadlines. Ms. Bonifaci expresses confusion concerning the proposed time-computation rules' treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals would direct one to reverse direction and count *forward to Monday*; in actuality, the proposals direct that one continue counting in the same direction – i.e., *back to Friday*.

The Subcommittee's view is that Ms. Bonifaci's comment on backward-counted time periods does not require a change in the proposal.

Time periods counted in hours. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules' directive to "count every hour" when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)'s presumptive seven-hour limit on the length of a deposition. He suggests that "the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2)." The lunchtime participants evidently wondered whether the new time-counting provision might be read to change either the practice of not counting breaks as part of the seven hours or the practice under which the deposition takes place during a single day. He notes: "On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future." As to these comments, the Subcommittee deferred to the Civil Rules Committee.

D. Listing and summary of time-computation comments

This section summarizes the comments we received relating to the time-computation project.[9] This listing focuses on comments relevant to over-arching issues concerning the time-computation project; comments directed solely to a particular issue concerning a particular set of Rules, such as Bankruptcy Rule 8002, are generally not included.[10]

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. Alex Luchenitser of Americans United for Separation of Church and State writes that Appellate Rule 26(c) should be amended so that its three-day rule tracks the three-day rule in Civil Rule 6(e). In fact, the package of Appellate Rules proposals that was out for comment includes a proposed amendment to Appellate Rule 26(c) intended to do what Mr. Luchenitser suggests.

In a follow-up comment, Mr. Luchenitser urges that "local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes."

07-AP-002; 07-BK-004; 07-CR-002; 07-CV-002: Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee"). The EDNY Committee writes in general opposition to the time-computation proposals, but supports certain of the Civil Rules Committee's proposals to lengthen specific Civil Rules deadlines.[11] The EDNY Committee also makes some suggestions for improving the project if it goes forward.

- Overall cost/benefit analysis. The EDNY Committee predicts that the proposed change in time-computation approach will cause much disruption, given the great number of affected deadlines that are contained in statutes, local rules, and

---

[9] This section is organized by docket number: It first lists all the consecutively-numbered comments in the Appellate Rules comment docket; then all the comments in the Bankruptcy Rules comment docket not already listed above; and then all comments in the Civil Rules docket not already listed above. (All time-computation comments in the Criminal Rules docket are encompassed in those first three categories.)

[10] The Bankruptcy Rules Committee specifically requested comment on whether the ten-day deadline for taking an appeal from a bankruptcy court to a district court or a BAP should be extended, either to 14 days or to 30 days. Many respondents opposed a 30-day period, and some also opposed any extension at all (even to 14 days). Some respondents, however, favor a 14-day period, while a handful favor a 30-day period. As to these comments, the Subcommittee deferred to the Bankruptcy Rules Committee.

[11] This memo does not treat in detail the EDNY Committee's views concerning the lengthening of specific Civil Rules deadlines; as to those comments, the Subcommittee deferred to the Civil Rules Committee.

standard forms. The EDNY Committee believes that the current time-counting system works well. To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.

- Incompleteness of offsetting changes. The EDNY Committee notes that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either. The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.

- Business-day provisions in local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days.

- Backward-counted time periods. The EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that the proposed time-computation template (like the existing rules) does not provide for a longer response time when motion papers are served by mail. The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods; as an example, the EDNY Committee points to the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York.

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook writes in support of the time-computation proposals. He suggests that in addition to the proposed changes, the three-day rule contained in Appellate Rule 26(c) should be abolished. He argues that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by our preference for setting periods in multiples of seven days.

07-AP-004; 07-BK-007; 07-BR-023; 07-CR-004; 07-CV-004: Walter W. Bussart. Mr. Bussart states generally that the proposed amendments are helpful and that he supports their adoption.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Overall, Mr. Horsley views the proposed amendments with favor.

With respect to one or more of the time periods in Appellate Rule 4 which the proposed amendments would lengthen from 10 to 14 days, Mr. Horsley proposes a further lengthening so that the period in question would be 21 days. As to these comments, the Subcommittee deferred to the Appellate Rules Committee.

Mr. Horsley also suggests amending Appellate Rule 26(c) to clarify how the three-day rule works when the last day of a period falls on a weekend or holiday. This suggestion is already accounted for by another proposed amendment to FRAP 26(c) that was out for comment. Mr. Horsley's suggestion in this regard can thus be taken as providing general support for the latter proposal.

07-AP-006; 07-BK-010; 07-CR-007; 07-CV-007: Stephen P. Stoltz. Mr. Stoltz generally supports the time-computation proposals. He argues, however, that the time-counting rules should define the "last day" as ending "at 11:59:59 p.m." rather than "at midnight." He suggests this because "[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time." He warns that if the time-counting rules provide that the "last day" of a period ends "at midnight," there will be confusion and courts may conclude that a "deadline is actually the day (or evening) before the particular day."

07-AP-007; 07-BK-011; 07-CR-008; 07-CV-008: Robert J. Newmeyer. Mr. Newmeyer is an administrative law clerk to Judge Roger T. Benitez of the U.S. District Court for the Southern District of California. Mr. Newmeyer stresses that the 10-day period set by 28 U.S.C. § 636(b)(1) must be lengthened to 14 days. This statute will presumably be on the list of statutory periods that Congress should be asked to lengthen, so this suggestion is in line with the Project's current scheme.

Mr. Newmeyer further suggests that it would be worthwhile to consider setting an even longer period for filing objections to case-dispositive rulings by magistrate judges. As to this comment, the Subcommittee deferred to the Civil Rules Committee.

Mr. Newmeyer also expresses confusion as to whether the Civil Rule 6(a) time-computation proposals affect the "three-day rule." As you know, the time-computation project does not propose to change the three-day rule, and it seems unlikely that there will be confusion on this score in the event that the time-computation proposals are adopted (Mr. Newmeyer's confusion probably springs from the fact that the time-computation rules as published include only provisions in which a change is proposed, and thus omit Civil Rule 6(d)). In any event, Mr. Newmeyer suggests that the three-day rule should be deleted. This suggestion, like Chief Judge Easterbrook's suggestion, is one that the Advisory Committees may well wish to add to their agendas, but is not one that seems appropriate for resolution in connection with the time-computation project itself.

07-AP-008; 07-BK-012; 07-CR-009; 07-CV-009: Carol D. Bonifaci. Ms. Bonifaci, a paralegal at a Seattle law firm, expresses confusion concerning the proposed time-computation rules' treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals would direct one to reverse direction and count forward to Monday.

Ms. Bonifaci observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., "no later than November 1, 2008") is not covered by the proposed time-computation rules, and she suggests that this should also be stated in the text of the proposed Rules.

07-AP-010; 07-CV-010: Public Citizen Litigation Group. Brian Wolfman writes on behalf of Public Citizen Litigation Group to express general support for the proposed days-are-days time-counting approach. Public Citizen suggests, however, that the deadlines for certain post-trial motions (and for the tolling effect – under Appellate Rule 4(a) – of Civil Rule 60 motions) be lengthened only to 21 rather than 30 days. Public Citizen argues that a 30-day period is unnecessarily long and will cause unwarranted delays. Public Citizen (like Howard Bashman) argues that it is awkward for the post-trial motion deadline to fall on the same day as the deadline for filing the notice of appeal. As to these comments, the Subcommittee deferred to the Civil Rules and Appellate Rules Committees.

07-AP-012; 07-BK-014; 07-CR-011; 07-CV-011: Robert M. Steptoe, Jr. Mr. Steptoe, a partner at Steptoe & Johnson, expresses concern "that the proposed time-computation rules would govern a number of statutory deadlines that do not themselves provide a method for computing time," and that the proposed rules "may cause hardship if short time periods set in local rules are not adjusted." Therefore, he urges that the time-computation proposals "not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification."

07-AP-015; 07-BK-018; 07-CR-014; 07-CV-016: FDIC. Richard J. Osterman, Jr., Acting Deputy General Counsel of the Litigation Branch of the Federal Deposit Insurance Corporation, writes to urge that Congress *not* be asked to amend the time periods set in certain provisions of the Federal Deposit Insurance Act. He explains that banking agencies such as the FDIC already "employ calendar days in their computations of time to respond to regulatory and enforcement decisions" – thus indicating that no adjustment is necessary or appropriate in connection with the time-computation project. Since no participant in the time-computation project has suggested that the FDIA provisions should be included on the list of statutory periods that Congress should be asked to change in light of the time-computation project, it seems fair to say that Mr. Osterman's suggestion accords with the approach that the project is already taking.

Mr. Osterman also suggests that Civil Form 3 be amended to "include a paragraph that references federal defendants, who have a full 60 days to respond as opposed to the standard 21

days you are proposing. This language is absent from the current summons form." As to this comment, the Subcommittee deferred to the Civil Rules Committee. (The version of Form 3 that is currently in effect does include an italicized parenthetical that states: "(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)")

07-AP-016; 07-BK-019; 07-CR-015; 07-CV-017: DOJ. Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the goals of the time-computation project, but also to express strong concerns "about the interplay of the proposed amendment with both existing statutory periods and local rules." The DOJ argues that "changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable." Otherwise, the DOJ fears that the purposes of some statutes "may be frustrated." The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create "confusion and uncertainty" to have two different time-counting regimes (one for rules and one for statutes).

Mr. Morford does not specifically state the DOJ's position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. His letter does refer to the Committee's identification of "some 168 statutes ... that contain deadlines that would require lengthening."[12]

The DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules.

07-AP-017: The State Bar of California – Committee on Appellate Courts. Blair W. Hoffman writes on behalf of the State Bar of California's Committee on Appellate Courts to express support for the time-computation project. He states that the simplification of the time-counting rules is desirable.

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules' directive to "count every hour" when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)'s presumptive seven-hour limit on the length of a deposition. He suggests that "the Committee

---

[12] On March 29, 2008, Jonathan Wroblewski, the Director of the Office of Policy and Legislation in the Criminal Division of the DOJ, provided the Criminal Rules Committee with a memo listing criminal statutory provisions that the DOJ believes are the highest priority for amendment in the light of the new time-computation approach.

might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2)." He also notes: "On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future."

07-BR-026; 07-BK-009: Alan N. Resnick. Professor Resnick previously served as first the Reporter to and then a member of the Bankruptcy Rules Committee. Of particular relevance to the overall Time-Computation Project, Professor Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006. He points out that a days-are-days approach would result in "the shortening of some state and federal statutory time periods."

Professor Resnick raises additional points that are less closely tied to the overall Time-Computation Project. Professor Resnick stresses that if time periods set by the Bankruptcy Rules and the Civil Rules are altered, care must be taken to adjust the Bankruptcy Rules so that newly-lengthened Civil Rules time periods are not inappropriately incorporated into the Bankruptcy Rules. In particular, Professor Resnick notes that the Bankruptcy Rules Committee should consider altering Bankruptcy Rule 9023's incorporation of Civil Rule 59's provisions if Civil Rule 59 is amended to change current 10-day time limits to 30 days. Professor Resnick also adds his voice to those that oppose the lengthening of Bankruptcy Rule 8002's ten-day appeal period. But if Rule 8002's ten-day period is lengthened, then Professor Resnick points out other time periods in the Bankruptcy Rules that he argues should be corresponding lengthened.

07-BK-013; 07-BR-029: Judge Philip H. Brandt. Judge Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers. Judge Brandt also raises points about Bankruptcy Rules 8002 and 9023; as to those points, the Subcommittee deferred to the Bankruptcy Rules Committee.

07-BK-015; 07-CV-014; 07-BR-033: Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York. The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee") writes in opposition to the time-computation proposals. The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").

The ABCNY Bankruptcy Committee's objections to the time-computation proposals are very similar to those stated by the EDNY Committee; in sum, the ABCNY Bankruptcy Committee believes that the costs of the time-computation proposals strongly outweigh their benefits. This summary highlights those aspects of the ABCNY Bankruptcy Committee's comments that differ from those of the EDNY Committee. The ABCNY Bankruptcy Committee suggests, among other problems, that "some local courts might decide to retain the present computational approach through the promulgation of local rules," which would compound the resulting confusion. The ABCNY Bankruptcy Committee also suggests that "'[m]idnight' is often defined as 12:00 a.m., or the beginning of a given day." Thus, the Committee "believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day."

07-BK-022; 07-CV-019: National Bankruptcy Conference. Richard Levin writes on behalf of the National Bankruptcy Conference ("NBC"), which "strongly endorses and supports" the comments previously submitted by Professor Alan Resnick. The NBC also warns that the proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests "that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further ...."

07-CV-005: Patrick Allen. Mr. Allen writes in opposition to the proposed extension of certain ten-day periods in Civil Rules 50, 52 and 59. Among other things, he notes that under current Civil Rule 6, 10-day time periods are computed by skipping intermediate weekends and holidays. He does not discuss the time-computation proposal to change to a days-are-days approach. As to these comments, the Subcommittee deferred to the Civil Rules Committee.

07-CV-013: Alexander J. Manners. Mr. Manners, a vice president of CompuLaw LLC, supports proposed Civil Rule 6(a)(5)'s treatment of backward-counted deadlines.

With respect to Civil Rule 6(a)(6)'s definition of the term "legal holiday," Mr. Manners proposes that proposed Rule 6(a)(6)(B) be changed to so as to read "any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court." He makes this suggestion out of concern that, otherwise, litigants will be confused as to whether a state holiday counts as a "legal holiday" for time-computation purposes in instances when the federal district court fails to close on that day, or when it closes only for some purposes, or when it closes but fails to give timely notice of the closure.

Mr. Manners observes that under a "plain reading" of the three-day rule as it is stated in current Civil Rule 6, the three-day rule does not apply to backward-counted deadlines since in those instances "the party is not required to act within a specified time after service." Mr. Manners argues that this can lead to unfairness. He suggests that Civil Rule 6's three-day rule should be amended to apply the three-day rule to backward-counted deadlines (or else that each

backward-counted deadline be modified to take account of this problem). Mr. Manners is not the only commentator to observe this problem with respect to the interaction of the three-day rule and backward-counted deadlines; the EDNY Committee suggests eliminating backward-counted deadlines for that reason among others. This suggestion, like other commentators' suggestions concerning the three-day rule, seems best addressed as a new agenda item for the relevant Advisory Committees rather than as part of the time-computation project.

Mr. Manners proffers several suggestions for guiding the local rules amendment process. He suggests that the district courts be given "an implementation guide and timeline for district courts to follow in order to ensure their local and judges' rules are amended correctly and in time to coincide with the adoption of the new Federal Rules." That guide should, he argues, encourage local rulemakers to lengthen affected short time periods (taking account, inter alia, of any relevant state holidays) and to use multiples of 7 days (where possible) when doing so.

Mr. Manners also proposes an alteration to Civil Rule 6(c)'s treatment of motion paper deadlines, a matter that seemed more appropriate for consideration by the Civil Rules Committee.

07-CV-015: U.S. Department of Justice. Jeffrey S. Bucholtz, Acting Assistant Attorney General, Civil Division, writes on behalf of the Department of Justice to comment on the proposed amendment to Civil Rule 81 that would define the term "state," for purposes of the Civil Rules, to "include[], where appropriate, the District of Columbia and any United States commonwealth, territory [, or possession]." The Department supports the definition's inclusion of commonwealths and territories, but opposes the inclusion of "possession." The Department is "concern[ed] that the term 'possession' might be interpreted – incorrectly – to include United States military bases overseas."

Howard Bashman's Law.com article. Mr. Bashman wrote a column on the time-computation proposals which can be accessed at http://www.law.com/jsp/article.jsp?id=1201918759261 . Mr. Bashman's main comment in his column concerns the Civil Rules proposal to extend certain post-trial motion deadlines. As has been noted, extending those deadlines from 10 to 30 days will mean that those deadlines fall on the same day as the Rule 4(a) deadline for taking an appeal in cases that do not involve U.S. government parties. Mr. Bashman's concern is that this will (1) prevent a potential appellant from knowing whether any post-trial motions will be filed prior to the deadline for taking an appeal and thus (2) increase the number of appeals that are filed only to be suspended pending the resolution of a timely post-trial motion. As to these comments, the Subcommittee deferred to the Civil Rules Committee and the Appellate Rules Committee.

V. Conclusion

Thanks to the hard work and input of many participants, we are ready to seek final approval of the amendments that implement the Time-Computation Project. We look forward to the Committee's consideration of the proposed amendments and of the list of proposed legislative changes to statutory time periods.

Encl.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[13]

Rule 6. Computing and Extending Time; Time for Motion Papers

~~**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:~~

~~**(1) *Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~**(2) *Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~**(3) *Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's~~

[13]New material is underlined; matter to be omitted is lined through.

~~office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

~~**(4)** ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means:~~

~~**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and~~

~~**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.~~

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in

any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

* * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the

approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently

ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after

a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another

reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may,

for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (motion for new trial "must be filed no later than 30 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an

event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, see *Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001"). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays, and defines the term "state" — for purposes of subdivision (a)(6) — to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

6.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

To: **Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **May 9, 2008**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Half Moon Bay, California, on April 7 and 8, 2008. Draft minutes of the meeting are attached. The Rule 56 Subcommittee held a conference call after the November 2007 Committee meeting and the Rule 26 Subcommittee held several conference calls and met in Phoenix on February 28, 2008. The fruits of the subcommittee activities are reported below in presenting recommendations to publish proposed amendments of Civil Rules 26 and 56 for comment.

Several Civil Rules amendments were published for comment in August 2007, including the Civil Rules part of the Time-Computation Project. The comments were useful but not numerous. All of the proposals, except for Rule 8(c), are recommended for adoption with a few modest revisions. The Time-Computation Project proposals will be separated from the other proposals to facilitate discussion in conjunction with the Time-Computation Project proposals for other sets of rules.

Parts I and II of this Report present the action items. Part I.A presents the Time-Computation Project proposals for adoption. Part I.B presents for adoption the other proposals published in August 2007, except for Rule 8(c). Part II.A recommends for publication a thorough revision of Rule 56 that regulates the procedure for seeking summary judgment without changing the standard for granting summary judgment. Part II.B recommends for publication proposals that would amend parts of the Rule 26 provisions governing disclosure and discovery with respect to expert trial witnesses. Both the Rule 26 proposal and the Rule 56 proposal were presented for preliminary discussion at this Committee's January 2008 meeting; the proposals have been improved by incorporating several responses to that discussion.

Part III presents a few information items.

I ACTION ITEMS

A. Time-Computation Project

(1) "Template" — Civil Rule 6(a)

Civil Rule 6(a) was chosen as the vehicle for the "template" provisions that are adopted in as nearly uniform terms as possible by each of the different sets of rules that have time-computation provisions. The Civil Rules Committee recommends Rule 6(a) for adoption as set out below.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 6. Computing and Extending Time; Time for Motion Papers

~~**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:~~

~~(1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~(2) ***Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when~~

[1]New material is underlined; matter to be omitted is lined through.

~~the clerk's office is inaccessible.~~

~~**(4)** ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means:~~

~~**(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and~~

~~**(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.~~

(a) **Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal

holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that

is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

* * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday,

Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may,

for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (motion for new trial "must be filed no later than 30 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday — no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, see *Hart v. Sheahan*, 396 F.3d 887,

891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001"). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays, and defines the term "state" — for purposes of subdivision (a)(6) — to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

(2) Civil Rules Time Provisions

Many Civil Rules containing specific time periods shorter than 11 days were published for comment on amendments extending the time periods to account for the impact of changing to a computation method that includes every day, abandoning the former practice of excluding intermediate Saturdays, Sundays, and legal holidays. As set out below, it is recommended that all of the proposals be adopted as published except for Rules 50, 52, and 59. The proposals to extend the time for motions under Rules 50, 52, and 59 from 10 days to 30 days have been scaled back to a 28-day period. The 28-day period was chosen in coordination with the Appellate Rules Committee to recognize the inconveniences that would arise from adopting the same 30-day period as the deadline for filing notices of appeal in most civil actions.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE**

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(b) Extending Time.

* * * * *

(2) ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b); ~~except as those rules allow~~.

(c) Motions, Notices of Hearing, and Affidavits.

(1) ***In General.*** A written motion and notice of the hearing must be served at least ~~5~~ 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

**New materials is underlined; matter to be omitted is lined through.

(C) when a court order — which a party may, for good cause, apply for ex parte — sets a different time.

(2) ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least ~~1~~ 7 days before the hearing, unless the court permits service at another time.

* * * * *

Summary of Comments*

RULE 6(A)(5): BACKWARD COUNTING

07-CV-002: The E.D.N.Y. Committee on Civil Litigation suggests the Civil Rules should be amended to eliminate backward counting periods. The time-computation amendments, by continuing to count backward when the last day of a period is an excluded day, exacerbate the bad effects of the proposals by shortening response periods still further. And the rules have no provision for extra days when service is by mail — "Nor is it clear how a workable rule could be drafted that would do this." Rule 6(c) is the most important of the backward-counting rules. E.D. & S.D.N.Y. Local Civil Rule 6.1 illustrates a way to eliminate backward counting. (It does this by not setting any time for serving a motion; it sets times only for opposing and for replying to the opposition.)

Recommendation: This proposal seems too complicated to be acted upon as part of the Time-Computation Project. Even if the project is deferred to coordinate statutory amendments, this question should be put on a separate track. Other backward-counting periods include disclosure periods set in days before trial; the Rule 26(f) conference set before the scheduling conference or order; notice before hearing on a default judgment; and Rule 68, noted below.

07-CV-013: Alexander J. Manners, Esq., notes that Rule 6(d) does not extend time when time is measured backward from an event. Rule 6(c)(1) will allow a motion to be served by any means at least 14 days before the time specified for the hearing. The motion can be served by mail, and intervening weekends or holidays may mean that delivery is even more than 3 days after service. There is less effective time to respond. One cure would be to set different times for service by any means other than in-hand service. He does not specify drafting language. The idea might be expressed in Rule 6(c)(1) like this: "A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, or at least 17 days before that time if service is made under Rule 5(b)(2)(C), (D), (E), or (F), with the following exceptions * * *." A more

---

*This is a partial summary of the comments on the Civil Rules Time-Computation Proposals published in August 2007. In the report for the Time-Computation Subcommittee Professor Struve has summarized the comments addressed to the general computation methods and questions shared by the several sets of rules. This summary addresses the comments that particularly concern specific Civil Rules proposals.

general approach might be to revise Rule 6(d), perhaps by designating the present subdivision as paragraph (1) and adding a new paragraph (2): "(2) When a party must make service within a specified time before a particular event and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the specified time." [This general approach would include such lengthy periods as the Rule 26(a)(2)(C) period for serving disclosures of expert testimony — 90 days before the date set for trial.]

Recommendation: The "3-day" rule is likely to be reconsidered, at least for electronic service. It may be better to consider this question together with Rule 6(d).

RULE 6(C): LENGTHENED TIMES

07-CV-002: The E.D.N.Y. Committee on Civil Litigation supports lengthening the time periods for moving and responding papers in Rule 6(c)(1) and (2). But it suggests that it might be better to set longer periods of substantive motions than for discovery motions. It points to E.D. & S.D.N.Y. Local Civil Rule 6.1. Rule 6.1 does not set times for moving; it does set times for opposing and for replying to the opposition.

07-CV-013: Alexander J. Manners, Esq.: Proposes revision of the 6(c)(1)(C) provision that allows a court to set a different time by order and addition of an authorization for local rules: "(C) When a ~~court order — which a party may, for good cause, apply for ex parte — sets a~~ different time is set by local rule or court order."

He also suggests a revision to account for backward-counting periods; see the Rule 6(a)(5) notes above.

Recommendation: Express authorization of local rules is little more attractive here than in many other settings. Distinction between substantive motions and discovery motions may merit consideration, but not because of the new computation method.

RULE 6(D): "3 DAYS ARE ADDED"

07-CV-008: Robert J. Newmeyer, Administrative Law Clerk, suggests that the "3 extra days" provision be "given a state funeral." It spawns confusion, debate, and needless motions. Three extra days are not needed after electronic service. (This comment also offers an illustration based on the Rule 6(c) backward-counting period for an affidavit opposing a motion; that period is not measured by service.)

Recommendation: This topic may move to the active agenda because of doubts about adding 3 days for service by electronic means. That will provide suitable occasion for reviewing service by other means.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within ~~20~~ 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within ~~20~~ 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within ~~20~~ 21 days after being served with an order to reply, unless the order specifies a different time.

* * * * *

(4) ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within ~~10~~ 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within ~~10~~ 14 days after the more definite statement is served.

* * * * *

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within ~~10~~ 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within ~~20~~ 21 days after being served with the pleading.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than ~~10~~ 14 days after serving its original answer.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within ~~20~~ 21 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should

freely give leave when justice so requires.

(3) ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within ~~10~~ 14 days after service of the amended pleading, whichever is later.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Summary of Comments

RULE 15(A)(2)

07-CV-006: Jack E. Horsley, Esq., recommends that an amendment increasing the ad damnum be allowed no later than 30 days before trial unless the defendant consents or the court orders a later time.

Recommendation: This question is not affected by the Time-Computation proposals. It does not seem to require immediate action.

Rule 23. Class Actions

* * * * *

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within ~~10~~ 14 days after the order is entered. An appeal does not stay proceedings in the district court unless

the district judge or the court of appeals so orders.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

* * * * *

(2) ***Notice and Service.*** At least ~~20~~ 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

* * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

* * * * *

(5) ***Limitations on Use.***

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than ~~11~~ 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

* * * * *

(d) Waiver of Objections.

* * * * *

(3) ***To the Taking of the Deposition.***

* * * * *

(C) *Objection to a Written Question.* An objection to the form of a written question under

Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within ~~5~~ 7 days after being served with it.

* * * * *

Committee Note

The times set in the former rule at less than 11 days and within 5 days have been revised to 14 days and 7 days. See the Note to Rule 6.

Rule 38. Right to a Jury Trial; Demand

* * * * *

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand — which may be included in a pleading — no later than ~~10~~ 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within ~~10~~ 14 days after being

served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

* * * * *

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than ~~10~~ 28 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than ~~10~~ 28 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

* * * * *

(d) Time for a Losing Party's New-Trial Motion. Any

motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than ~~10~~ 28 days after the entry of the judgment.

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Summary of Comments

RULES 50, 52, 59: CHANGE TO 30 DAYS

07-CV-002: The E.D.N.Y. Committee on Civil Litigation supports lengthening the time for post-trial motions under Civil Rules 50, 52, and 59 from 10 days to 30. "[T]his is a more realistic time period."

07-CV-005: Patrick W. Allen, Esq., thinks that the proposed change to 30 days will lead to unnecessary delay; a party should be able to decide within 10 days. (The comment apparently assumes continuation of the present rule that Saturdays, Sundays, and legal holidays are not counted in measuring 10 days.)

07-CV-010: Public Citizen Litigation Group, by Brian Wolfman, suggests that the period should be 21 days, not 30. (1) "Although the current 10-day period is tight, we have never found it unmanageable. We acknowledge, however, that the current deadline may make it difficult to file some post-trial motions, particularly those under Rule 50 and 52. Nevertheless, we are concerned that a 30-day period will unnecessarily delay the proceedings and may even encourage litigants to file unwarranted post-judgment motions." (2) 30 days is undesirable because that is the appeal time limit for most civil actions. The result will be many notices of appeal filed prematurely, and suspended, "significantly increas[ing] the number of instances in which appeals and post-judgment motions are pending simultaneously. At the very least, circuit clerks will have to send out forms to litigants prematurely, and litigants will have to fill them out prematurely." (This comment underscores the need to consider this question in tandem with the Appellate Rules Committee.)

07-CV-014: The New York City Bar Committee on Bankruptcy notes a problem of integration with the Bankruptcy Rules appeal period, now 10 days and proposed to become 14 days: simple incorporation of Rules 52 and 59 would set the time to move for reconsideration long after expiration of the appeal period. The Bankruptcy Rules incorporating Rules 52 and 59 should be amended to

limit the time periods to correspond to the appeal period in Bankruptcy Rule 8002.

07-CV-019: The National Bankruptcy Conference also notes that continuing incorporation of Civil Rule 59 into the Bankruptcy Rules would defer finality until expiration of the 30-day period for seeking a "new trial." This would severely impair the need for prompt finality and implementation of many forward-looking bankruptcy orders. This comment attaches and endorses a parallel comment by Professor Alan N. Resnick, former Reporter and member of the Bankruptcy Rules Committee.

Email from Professor Struve to Professor Cooper regarding Appellate Rules Deadlines Subcommittee conference call (March 5, 2008):

To: "Edward H. Cooper" <coopere@umich.edu>
cc: "'Carl_Stewart@ca5.uscourts.gov'" <Carl_Stewart@ca5.uscourts.gov>, Mark_Kravitz@ctd.uscourts.gov, Jeffrey_Sutton@ca6.uscourts.gov, "Douglas.Letter@usdoj.gov" <Douglas.Letter@usdoj.gov>, MAUREEN.MAHONEY@LW.com, "Levy, Mark" <MLevy@kilpatrickstockton.com>
Subject: Appellate Rules Deadlines Subcommittee views on Civil Rules deadlines for tolling motions

Dear Ed,

The Appellate Rules Deadlines Subcommittee held a conference call today and discussed, among other issues, the questions raised during the comment period concerning the Civil Rules Committee's proposal to extend to 30 days the deadlines for renewed motions for judgment as a matter of law under Rule 50(b), motions for a new trial under Rules 50(d) and 59(b), motions for amended or additional findings under Rule 52(b), and motions to amend or alter a judgment under Rule 59(e). I write to summarize the views expressed during our call; these views, of course, are only those of members of the Deadlines Subcommittee, and not the views of the Appellate Rules Committee as a whole. I trust that the Subcommittee members (who are cc'd on this email) will correct any misstatements!

Deadlines Subcommittee members are very sympathetic to the concern that setting the deadline for these motions at 30 days will prevent a potential appellant from knowing (at the time the notice of appeal is to be filed) whether another party will make a motion that will toll the time for appeal and suspend the effectiveness of a previously-filed notice of appeal. Though the group did not arrive at a concrete suggestion, the following views were expressed and may be useful as the Civil Rules Committee considers the question:

--The Subcommittee would be uncomfortable with a regime in which the tolling motion deadlines are set at 30 days. It seems problematic for a potential appellant to have to file the notice of appeal without knowing whether a tolling motion will be filed.

--Even though the issue will only arise when more than one party is dissatisfied with a judgment, that situation is not all that rare, given the many cases in which there are more than just two parties. (The issue will not arise, though, in cases where FRAP 4(a)(1)(B) and Section 2107 provide a 60-day appeal deadline because the United States or its officer or agency is a party.)

--It was felt that in a number of cases 21 days would suffice to prepare post-judgment motions. On the other hand, members noted that often 21 days will not be enough. The federal government, for example, almost always would want more time than 21 days to prepare such a motion.

--Members discussed the fact that Civil has concluded that the current Civil Rules do not permit extensions of these motion deadlines, and that the proposed amendment to Civil Rule 6(b) underscores the fact that no extensions to those deadlines are permitted. Members recounted their experience that lawyers often feel that they need more time than the current Rules provide to prepare post-judgment motions, and recalled that one way in which district judges finesse the issue is to permit a barebones motion within the required time period, followed by a more detailed brief at a later point. (I noted that some district courts also might delay the entry of judgment as a way of finessing the point.)

--Members wondered whether, if the motion deadline were set at 21 days, it would be possible for the Rules to authorize the court to extend that deadline in a particular case. We discussed the fact that this question would be particularly fraught given the motions' function as tolling motions under Appellate Rule 4(a)(4). We noted the Ninth Circuit's recent conclusion that to the extent post-judgment motions function as tolling motions for purposes of civil appeal time, the deadlines for those motions are jurisdictional. See U.S. v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1100 -01 (9th Cir. 2008). Would a court in the Ninth Circuit find that a barebones motion within the deadline, later followed by more detailed briefing, qualified as "timely" for purposes of tolling under Rule 4(a)(4)?

--In the light of the concerns that might arise (post-Bowles) when rules authorize a court to extend a deadline that is considered jurisdictional, it would seem optimal for the Civil Rules to set a livable deadline for post-judgment motions so that extensions would not ordinarily be necessary. Perhaps this justifies departing from the 7-day-increment presumption and setting the deadline at something a bit longer than 21 days. Members noted that setting the deadline at 28 days might allow a would-be appellant to know whether a motion has been made before filing the notice of appeal (at least when CM/ECF is used) but did not advocate 28 days since that would in effect encourage appellants to wait to the next-to-last day to file their notice of appeal -- an undesirable practice. Perhaps 25 days might strike a middle point? No consensus was reached on this issue.

I hope that this is helpful!

Best regards,

Cathie

Discussion: The Committee recommends that 28-day periods be substituted for the 30-day periods in Rules 50, 52, and 59 as published.

The initial choice of 30-day periods began with the view that the 10-day periods in the present rules are too short in many complex cases. Courts often respond by one of two strategies. The simpler and safer is to delay entry of judgment; the difficulty with this strategy is that it induces feelings of guilt stemming from the Rule 6(b)(2) direction that these periods cannot be extended. The other strategy is to require timely filing within the 10-day period but allow an extended briefing schedule and permit wide latitude in developing arguments made in general terms in the motion.

The Committee considered the possibility of amending Rule 6(b)(2) to permit extension of the Rules 50, 52, and 59 time periods on a case-by-case basis. Even putting aside the question whether that approach should extend to Rule 60(b) as well, permitting extension of time periods closely integrated with the time to appeal under Appellate Rule 4 seemed risky. It opted instead to extend the Rules 50, 52, and 59 periods to a length that should suffice in almost all cases. Picking the length of the periods began by recognizing that the present 10-day periods run for at least 14 days, and will run longer still if there is an intermediate legal holiday. An extension to 21 days did not seem to provide much relief. Adhering to the convention that chooses 7-day multiples only for periods of 7, 14, and 21 days, the choice was to recommend 30 days.

The comments and the advice of the Appellate Rules Committee showed that it is better to avoid a 30-day period because the time to file a notice of appeal in most civil actions also is 30 days. The prospect that a notice of appeal filed on the last day will be made "premature" by a post-judgment motion filed on the same day is not attractive. Some parties will become confused and manage to mismanage the notice-of-appeal requirements at later stages. The Civil Rules Committee concluded that the period in Rules 50, 52, and 59 should be shortened. It concluded that 28 days would be better than 21 days if the Appellate Rules Committee should concur that this alternative would adequately reduce the risks that attend premature notices of appeal. The Appellate Rules Committee has concurred. This will become the only 28-day period in the Civil Rules — former 30-day periods were retained as 30-day periods, making 30 days the ceiling of the 7-day increments approach. The value of allowing this much time, however, outweighs the seeming eccentricity.

Changes Made after Publication and Comment

The 30-day period proposed in the August 2007 publication is shortened to 28 days.

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

* * * * *

(b) Amended or Additional Findings. On a party's motion filed no later than ~~10~~ 28 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

* * * * *

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Discussion: The Committee recommends shortening the 30-day period published for comment to 28 days. The reasons are given in the discussion of Rule 50.

Changes Made after Publication and Comment

The 30-day period proposed in the August 2007 publication is shortened to 28 days.

Rule 53. Masters

* * * * *

(f) Action on the Master's Order, Report, or Recommendations.

* * * * *

(2) ***Time to Object or Move to Adopt or Modify.*** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than ~~20~~ 21 days after a copy is served, unless the court sets a different time.

* * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule 54. Judgment; Costs

* * * * *

(d) Costs; Attorney's Fees.

(1) ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on ~~1 day's~~ 14 days' notice. On motion served within the next ~~5~~ 7 days, the court may review the clerk's action.

* * * * *

Committee Note

Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response. The former 5-day period to serve a motion to review the clerk's action is extended to 7 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Rule 55. Default; Default Judgment

* * * * *

(b) Entering a Default Judgment.

* * * * *

(2) ***By the Court.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least ~~3~~ 7 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

* * * * *

Committee Note

The time set in the former rule at 3 days has been revised to 7 days. See the Note to Rule 6.

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. ~~The motion may be filed at any time after:~~

~~(1) 20 days have passed from commencement of the~~

~~action; or~~

~~(2) the opposing party serves a motion for summary judgment.~~

(b) By a Defending Party. A party against whom relief is sought may move ~~at any time~~, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) ~~Serving the~~ Time for a Motion, Response, and Reply; Proceedings. ~~The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day.~~

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

* * * * *

Committee Note

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages — including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

Rule 59. New Trial; Altering or Amending a Judgment

* * * * *

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than ~~10~~ 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion.

The opposing party has ~~10~~ 14 days after being served to file opposing affidavits~~; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation~~. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than ~~10~~ 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than ~~10~~ 28 days after the entry of the judgment.

Committee Note

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

Former Rule 59(c) set a 10-day period after being served with a motion for new trial to file opposing affidavits. It also provided that the period could be extended for up 20 days for good cause or by stipulation. The apparent 20-day limit on extending the time to file

opposing affidavits seemed to conflict with the Rule 6(b) authority to extend time without any specific limit. This tension between the two rules may have been inadvertent. It is resolved by deleting the former Rule 59(c) limit. Rule 6(b) governs. The underlying 10-day period was extended to 14 days to reflect the change in the Rule 6(a) method for computing periods of less than 11 days.

Discussion: The Committee recommends shortening the 30-day period published for comment to 28 days. The reasons are given in the discussion of Rule 50.

Changes Made after Publication and Comment

The 30-day period proposed in the August 2007 publication is shortened to 28 days.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until ~~10~~ 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 65. Injunctions and Restraining Orders

* * * * *

(b) Temporary Restraining Order.

* * * * *

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed ~~10~~ 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. ~~More than 10~~ At least 14 days before the date set for trial ~~begins~~, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within ~~10~~ 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of

acceptance, plus proof of service. The clerk must then enter judgment.

* * * * *

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least ~~10~~ 14 days — before the date set for a hearing to determine the extent of liability.

* * * * *

Committee Note

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins, or — if liability has been determined — at least 10 days before a hearing to determine the extent of liability. It may be difficult to know in advance when trial will begin or when a hearing will be held. The time is now measured from the date set for trial or hearing; resetting the date establishes a new time for serving the offer.

The former 10-day periods are extended to 14 days to reflect the change in the Rule 6(a) method for computing periods less than 11 days.

Summary of Comments

RULE 68

07-CV-013: Alexander J. Manners, Esq., points to a problem that exists in current Rule 68 equally with the proposed time revisions. The evident purpose of the rule is to require a decision whether to accept a Rule 68 offer of judgment before trial starts. But there is a loophole. Using the proposed times to illustrate, the offer may be served "at least 14 days before the date set for trial * * *. If, within 14 days after being served, the opposing party" accepts, it is accepted. But if service is made by any means other than in-hand, Rule 6(d) adds 3 days after the period expires. That could be during or even after trial. This question could be addressed in Rule 68: "If, ~~within~~ by the earlier of 14 days after being served or the start of trial, the opposing party serves written notice accepting the offer * * *."

Recommendation: This one is tempting. But no one has suggested a practical problem. Perhaps the question should be carried forward with the general question of backward-counting periods.

Rule 71.1. Condemning Real or Personal Property

* * * * *

(d) Process.

* * * * *

(2) ***Contents of the Notice.***

(A) *Main Contents.* Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within ~~20~~ 21 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the

court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

* * * * *

(e) Appearance or Answer.

* * * * *

(2) ***Answer.*** A defendant that has an objection or defense to the taking must serve an answer within ~~20~~ 21 days after being served with the notice. The answer must:

* * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Rule 72. Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy. A party may not assign as

error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

* * * * *

(2) ***Objections.*** Within ~~10~~ 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within ~~10~~ 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 6.

Summary of Comments

RULE 72

07-CV-008: Robert J. Newmeyer, Administrative Law Clerk, urges that 28 U.S.C. § 636(b)(1) must be amended to agree with the 14-day periods set by proposed Rule 72. He also suggests that 14 days is too short for objections to recommended disposition of a dispositive matter — the time should be 28 days, or 30.

Recommendation: Amendment of § 636(b) is the one statutory recommendation firmly set for the Civil Rules list.

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

* * * * *

(2) ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) ~~20~~ 21 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;

(B) ~~20~~ 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) ~~5~~ 7 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

* * * * *

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within ~~10~~ 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

* * * * *

Committee Note

The times set in the former rule at 5, 10, and 20 days have been revised to 7, 14, and 21 days, respectively. See the Note to Rule 6.

Rule B. In Personam Actions: Attachment and Garnishment

* * * * *

(3) Answer.

(a) By Garnishee. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within ~~20~~ 21 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

* * * * *

Committee Note

The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 6.

Rule C. In Rem Actions: Special Provisions

* * * * *

(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within ~~10~~ 14 days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Maritime Arrests and Other Proceedings.[****]

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement

[****]A technical revision of Supplemental Rule C(6)(a) has been proposed for adoption without publication to take effect on December 1, 2008. That revision has no effect on the proposal to amend subparagraph (A) to extend the time to file from 10 days to 14 days.

of right or interest:

(A) within ~~10~~ 14 days after the execution of process, or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within ~~20~~ 21 days after filing the statement of interest or right.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Rule G. Forfeiture Actions In Rem

* * * * *

(4) Notice.

* * * * *

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B).

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than ~~20~~ 21 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

* * * * *

(5) Responsive Pleadings.

* * * * *

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within ~~20~~ 21 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within ~~20~~ 21 days after the motion is served.

(b) Answers or Objections. Answers or objections to these interrogatories must be served within ~~20~~ 21 days after the interrogatories are served.

(c) Government's Response Deferred. The government need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until ~~20~~ 21 days after the claimant has answered these interrogatories.

* * * * *

Committee Note

The times set in the former rule at 20 days have been revised to 21 days. See the Note to Rule 6.

Form 3. Summons.

(Caption — See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within ~~20~~ 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure.

* * * * *

FORM 3

07-CV-016: FDIC Legal Division, offers an observation generated by the form of publication. The August publication uses asterisks to indicate that not all of Form 3 was published. The omitted part includes the very advice the FDIC thinks should be there — that the period is 60 days, not 21 days, if the defendant is the United States, a United States agency, etc.

Recommendation: None needed.

Form 4. Summons on a Third-Party Complaint.

(Caption — See Form 1.)

To *name the third-party defendant*:

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within ~~20~~ 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure.

* * * * *

Form 60. Notice of Condemnation.

(Caption — See Form 1.)

* * * * *

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within ~~20~~ 21 days [after being served with this notice][from (insert the date of the last publication of notice)]. Send your answer to this address _____.

* * * * *

RULE 30(d)(1): 1 DAY OF 7 HOURS

07-CV-018: The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure suggests that some means should found to state clearly whether the "hours-are-hours" approach supersedes the Committee Note to Rule 30(d)(1), which states that the 7 hours for a deposition is calculated by actual time taken, not including breaks. Some members suggested that if break time continues to be excluded, the Committee should consider revising Rule 30(d)(1) because it is difficult to fit 7 hours of actual deposition time into one day when breaks are excluded.

Discussion: The Committee concluded that there is no need to address this question by adding a comment to the Rule 6 Committee Note. The common-sense advice in the 2000 Committee Note should be sufficiently ingrained in practice to prevail without difficulty.

(3) Statutory Time Periods

Civil Rule 6(a) applies in calculating statutory time periods. The Time-Computation Subcommittee has coordinated the work of identifying statutory time periods that should be increased to offset the de facto reduction that will result from changing to a days-are-days computation method. Professor Struve compiled a long list of statutes that set periods less than eleven days. After studying the statutes that bear on civil actions, the Committee concluded that only one statute should be recommended for amendment. 28 U.S.C. § 636(b) sets the period for objecting to magistrate judge orders and recommendations at 10 days. Proposed Rules 72(a) and (b) extend the time from 10 days to 14 days, recognizing that under the present computation method 10 days has always meant at least 14 calendar days. It is essential that § 636(b) be amended to allow 14 days so that statute and rule continue to operate in harmony as they always have.

The reasons for concluding that no other statutes need be recommended for amendment are summarized in the draft Minutes for the April Committee meeting.

B. Amended Rules Published in August 2007

Proposed amendments to Rule 8(c), 13(f), 15(a), 48(c), and 81(d) were published for comment in August 2007. All but Rule 8(c)are recommended for adoption as published, apart from deleting references to "possession" from Rule 81(d)(2) and its Committee Note. Rule 8(c) will be held for further study in the Advisory Committee. Bankruptcy Judges have repeatedly advised that deleting "discharge in bankruptcy" from the Rule 8(c) list of affirmative defenses is both appropriate and long overdue. The Department of Justice has expressed reservations that require further attention.

AUGUST 2007 PUBLISHED PROPOSALS TO AMEND RULES 8(C), 13(F), 15(A), 48(C), 81(D)

Proposals to amend Rules 8(c), 13(f), 15(a), 48(c), and 81(d) were published for comment in August 2007. Comments were received on all but Rule 48(c). The proposals, summaries of comments, and recommendations are set out separately for each rule.

Rule 8. General Rules of Pleading

* * * * *

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- ~~discharge in bankruptcy;~~
- duress;
- estoppel;
- failure of consideration;
- fraud;

- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

* * * * *

Committee Note

"[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. These consequences of a discharge cannot be waived. If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.

Summary of Comments

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, writes at length to argue that "discharge in bankruptcy" should not be deleted from the Rule 8(c) list of affirmative defenses. Alternatively, the Committee Note should explain that the change is intended to require that creditors plead that the debt was excepted from discharge, and should not observe that the effect of a discharge ordinarily is determined by the bankruptcy court that entered the discharge.

It is recognized that the 9th Circuit BAP in 2005 ruled that a 1970 bankruptcy code amendment invalidated the "discharge in bankruptcy" provision of Rule 8(c); it is argued that whether or not the

decision is correct as to the effects of the 1970 amendment, it is wrong after adoption of the 1978 Code. The 1970 amendment reflected fears that creditors would bring actions on discharged debts, hoping for defaults that would waive the discharge defense. Now sanctions for willful violations of the discharge injunction provide adequate deterrence. In any event, if the debt was discharged the debtor can invoke Rule 60(b) to vacate the judgment or can ask the bankruptcy court to enforce the discharge injunction.

The central point is that not all debts of a bankruptcy debtor are discharged even if the debtor is "discharged." Some debts are excepted.

One category of debts are not dischargeable only if declared not dischargeable by the bankruptcy court during the bankruptcy case; these are the only debts within the exclusive determination of the bankruptcy court — the creditor must advance these grounds of nondischargeability in the bankruptcy case or lose them.

Other debts are automatically excepted from discharge by operation of law; there is no need to raise nondischargeability in the bankruptcy case. Such debts include tax debts governed by 11 U.S.C. § 523(a)(1) — disputes frequently arise on the (a)(1)(C) question whether the debtor made any willful attempt to defeat the tax. At some point someone needs to plead to this question.

A debt also is not discharged if the creditor is not given notice of the bankruptcy case in time to file a claim. Because of this possibility, it is urged that "a debtor who responds to a post-discharge complaint on a debt that may well be excepted from discharge" without raising discharge as a defense should not be able to avoid the ensuing judgment. [It is not said how common this event is as compared to other grounds for nondischargeability, nor why the judgment should not be void under the governing statute if indeed the creditor had the required notice.]

The Committee Note observation about determination of the effect of a discharge by the bankruptcy court that entered the discharge is countered by observing that bankruptcy jurisdiction is conferred on the district courts (and the bankruptcy courts as units of the district courts).

It also is argued that a judgment on a debt that was arguably excepted from discharge must be accorded res judicata effect; this argument migrates into the assertion that if discharge is deleted as an affirmative defense the Committee Note should recognize that the result is to shift to the creditor the burden of pleading nondischargeability. At least if the pleaded ground of nondischargeability is "plausible," the debtor should not be able to completely ignore the action on the claimed debt. (The idea seems to be that if the plaintiff pleads nondischarge and the defendant fails to deny the allegation, nondischarge is admitted.)

It also is argued that the statutory provision barring waiver of the provisions on the discharge injunction and voiding a judgment addresses only contractual waivers, not waiver by failure to plead discharge as an affirmative defense.

And it is noted that nonbankruptcy courts have concurrent jurisdiction to determine the application of a specific exception to discharge.

A particular problem arises from tax debts. The government often sues both the tax debtor and a fraudulent transferee, seeking a personal judgment against the debtor on the theory that the tax debt was not dischargeable because of a willful attempt to defeat payment and also judgment against the transferee. The debtor rushes to the bankruptcy court with a complaint to determine dischargeability. If the bankruptcy court proceeds, the government is at risk that a victory declaring the debt not dischargeable is not binding in the separate action against the transferee, while a ruling that the debt was discharged forecloses any action against the transferee. It is better to avoid dual litigation of the same issue by retaining jurisdiction in the district court where the collection action was filed.

Finally, it is urged that no apparent hardship has resulted from Rule 8(c), and that state practice commonly also treats discharge as an affirmative defense.

Response: Deletion of "discharge in bankruptcy" from the Rule 8(c) catalogue of affirmative defenses was recommended with confidence by bankruptcy judges. The detailed Department of Justice comments suggested the need for further advice. Professor Jeffrey Morris, Reporter for the Bankruptcy Rules Committee, generously took up the request for help and provided this response:

RESPONSE TO DOJ COMMENT ON CIVIL RULE 8(c)

The Department is correct, in part, in noting that creditors may pursue in either state or federal courts the collection of debts that are not discharged. It is also correct in noting that bankruptcy courts have exclusive jurisdiction only over dischargeability actions under § 523 (a)(2), (4), and (6) as provided by § 523(c). Furthermore, the Department is correct that the bankruptcy courts have concurrent jurisdiction with other federal courts and state courts to determine the dischargeability of claims excepted from the discharge under the other subparagraphs in § 523(a) of the Bankruptcy Code. I do not believe that these correct statements, however, lead to the conclusion that Rule 8(c) should not be amended to delete "discharge in bankruptcy" from the list of affirmative defenses.

The Civil Rules Committee noted in its materials published in connection with the publication of the proposed amendment to Rule 8(c) that § 524(a)(1) provides that any judgment that is obtained at any time is void to the extent that the judgment purports to determine the personal liability of the debtor with respect to a discharged debt. The premise of the deletion of "discharge in bankruptcy" from the list of affirmative defenses is that the statute operates to prevent any such judgment from being effective. There should be no need for a debtor to affirmatively assert the discharge as a defense in an action based on a discharged claim. That is true without regard to whether the creditor is a governmental unit, or any other type of creditor. If the underlying claim is allegedly nondischargeable under § 523(a)(2), (4), or (6), and the creditor does not act timely in the bankruptcy court to obtain an order that the debt is excepted from the discharge, that creditor is permanently enjoined under § 524(a)(2) from attempting to collect that debt. Moreover, if the creditor violates that injunction and obtains a judgment, that judgment is void (note that it is void and not voidable) under § 524(a)(1). This statutory scheme is, and is intended to be, self executing. Requiring a debtor (who has already been told not to worry about a creditor who holds a discharged debt) to affirmatively plead the bankruptcy discharge is inconsistent with this system.

The Department notes that this system actually predates the 1978 Code, and the Civil Rules Committee's materials also highlight that fact. Those materials state that § 524(a)(1) and its predecessor statute both created an injunction against the collection of discharged debts and against any attempts to collect those debts. In fact, one need not go too far back to find (off the top of my head, I think it was in 1966 or so) that debtors once had to apply for a discharge, and the failure to do so resulted in a debtor going through the process but receiving no discharge even though no grounds existed on which to object to the discharge. This led to the change in the default rule from "no discharge unless requested by the debtor" to "discharge granted unless an objection is successfully obtained by a party in interest." Retaining the discharge as an affirmative defense is inconsistent with over 40 years of bankruptcy law.

The Department is correct that many kinds of debts are not discharged. Of course, for those debts, the debtor/defendant cannot affirmatively or otherwise plead the defense of a bankruptcy discharge. The only impact of maintaining the requirement that debtors affirmatively plead the discharge defense is to obtain judgments more easily in cases in which the debtor otherwise files an answer. Thus, under the DOJ view, if debtor/defendants file no answer, default judgments can be entered. If they file an answer but do not include an available bankruptcy discharge defense, then the discharge defense is waived. This directly contradicts § 524(a) and should not be permitted under the Civil Rules.

It is this statutory scheme that makes deletion of "discharge in bankruptcy" from Rule 8(c) appropriate and, indeed, necessary. The other issues about concurrent jurisdiction and the like raised by DOJ are all correct, but not truly relevant. The closest question the Department raises has very little to do with DOJ whose most likely problems will arise under the tax and student loan nondischargeability categories. That is, under § 523(a)(3), creditors whose claims are not listed in the bankruptcy case can later assert in any court with jurisdiction that their claim was not discharged in the bankruptcy case. The Department's brief discussion of the issue, however, is misleading in my opinion. In fact, the vast majority of individual debtor bankruptcy cases are no asset cases. The overwhelming majority of courts that have considered the issue have held that claims that were not listed in the debtor's case are nonetheless discharged. Section 523(a)(3) is effectively limited to the protection of the holders of claims that suffered by virtue of not receiving notice of the case. These creditors are those who could not timely file an action under § 523(a)(2), (4), or (6), or creditors who would have shared in a distribution of the estate's assets if they had been able to file a proof of claim in a timely fashion. Because most of the individual debtor cases are no asset cases, § 523(a)(3) plays a limited role.

My bottom line – the Rule should be amended as proposed. The Committee Note, however, should also be amended to avoid the suggestion made in the last sentence of the Note. The sentence certainly does not state that the bankruptcy court has exclusive jurisdiction over all matters relating to the discharge, but it could be misunderstood as meaning that bankruptcy courts have this exclusive jurisdiction. It is clear to me that the Committee had no such intention. The Note merely states what I think is the most regular result when an issue of the extent of the bankruptcy discharge is raised. But, **amending the Committee Note to replace the last sentence with something along the following lines might be more appropriate.**

SUGGESTED ADDITION TO COMMITTEE NOTE TO RULE 8(c):

> Because the Bankruptcy Code provisions governing the effect of the discharge are self-executing, it is inappropriate to require that debtors affirmatively raise the discharge as a defense.

Recommendation: The Committee concluded that if the objections of the Department of Justice can be resolved in time for a recommendation of the Standing Committee, "discharge in bankruptcy" should be stricken from Rule 8(c), as published, and that the final sentence of the published Committee Note be replaced as set out below. Because the objections have not been resolved, it is recommended that this proposal be deferred for further study.

This recommendation rests on the structure of the bankruptcy statutes. Rule 8(c) does not now address an action on a claim that has not been discharged in bankruptcy, and it will not address such an action after the amendment. If a debt has in fact been discharged, however, it would be inconsistent with the statutes even to require the discharged debtor to plead the discharge, much less to waive the discharge by failure to plead it. A judgment on a discharged debt is void, and there is no reason to contemplate superseding the statute even if that could be done without abridging the substantive right created by the discharge. (It would do no good, and much mischief, to create a special category of affirmative defense that must be pleaded but is not lost by failure to plead and that voids the judgment.)

The last sentence of the Committee Note as published, however, offers advice on a topic — the relationships between the court where the action is filed and the bankruptcy court that entered the discharge — that is better left to be worked out by the courts in whatever circumstances present themselves. The concerns raised by the Department of Justice may deserve recognition by adding a few words in the next-to-last sentence and substituting a new final sentence as follows:

* * * These consequences of a discharge cannot be waived; the Bankruptcy Code

provisions governing the effect of a discharge are self-executing. ~~If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.~~ This amendment does not address pleading by a claimant who believes that a claim is not barred by an adversary's discharge.

Rule 13. Counterclaim and Crossclaim

* * * * *

~~**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.~~

* * * * *

Committee Note

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430*. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

Summary of Comments

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the change.

Discussion: That Rule 13(f) be recommended for adoption as published. No changes need be made in the Committee Note.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course ~~within~~:

(A) ~~before being served with a responsive pleading;~~ 21 days after serving it, or

(B) ~~within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar~~ if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

* * * * *

Committee Note

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly

the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,** and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

** This statement anticipates the December 1, 2007 effective date of pending Rule 40 amendments.

Summary of comments

07-CV-011: Robert M. Steptoe, Jr., Esq. agrees that a responsive pleading and a motion to dismiss should have the same impact on the right to amend once as a matter of course. But he suggests that the result should be that service of either cuts off the right to amend as a matter of course. Leave is often granted when it is required. Requiring leave will encourage plaintiffs to take greater care in framing the first amended complaint; that will help defendants because of "the closer scrutiny" given a second or subsequent motion for leave to amend.

07-CV-012: Professor Bradley Scott Shannon suggests (1) that the right to amend should be cut off by either a responsive pleading or a Rule 12 motion. "[T]he balance would be better struck by placing more of a burden to avoid mistakes on the initial pleader." Even if the mistakes are fairly correctable, the court should retain discretion to grant or deny leave to amend. (2) "[A] court is all but compelled to defer consideration on a motion to dismiss until the 21 day period expires. That does not seem very efficient."

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the change.

07-CV-018: The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure offers "strong support." "This promotes economy and eliminates delay where a Rule 12 motion is filed in response to the original complaint and the amendments ultimately do not alter the bases for the Rule 12 motion."

07-CV-020: The Jordan Center for Criminal Justice and Criminal Reform makes two suggestions. The second is that the period to amend once as a matter of course after service of a responsive pleading or a Rule 12 motion should be extended to 28 days; 21 days is not enough, particularly when the defendant points out deficiencies that require "further factual investigation that may dramatically affect the legal landscape of the action." The first rests on misinterpreting what is intended: the comment reads the proposal to create a gap that suspends and then revives the right to amend once as a matter of course — the right persists for 21 days after service of the pleading, disappears, and then reappears for 21 days after service of a responsive pleading or Rule 12 motion. The question raised by this suggestion is whether (a)(1)(A) should be revised: "(A) if the pleading is one to which a responsive pleading is not required, 21 days after serving it; (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion * * *."

Discussion: That Rule 15(a) be recommended for adoption as published. No changes need be made in the Committee Note. The Subcommittee and Committee considered many variations on the right to amend once as a matter of course and the events that cut it off. The argument that at least a responsive pleading should immediately terminate the right to amend was advanced vigorously in Standing Committee discussion. No new reasons have been suggested for reconsidering the recommendation. The suggestion made by the Jordan Center is a matter of style; the rule as published seems clear.

Rule 48. Number of Jurors; Verdict; Polling

(a) Number of Jurors. A jury must ~~initially have~~ begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or assent by the number of jurors required by the parties' stipulation, the court may direct the jury to deliberate further or may order a new trial.

Committee Note

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Summary of Comments: There were no comments on Rule 48(c).

Discussion: That Rule 48(c) be recommended for adoption as published. No changes need be made in the Committee Note.

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(d) Law Applicable.

(1) ***"State Law" Defined.*** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) ~~***District of Columbia***~~ ***"State" Defined.*** The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth, or territory ~~[, or possession]~~. ~~When these rules provide for state law to apply, in the District Court for the District of Columbia:~~

~~(A) the law applied in the District governs; and~~

(3) ***"Federal Statute" Defined in the District of Columbia.*** ~~(B)~~ In the United States District Court for the District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

Committee Note

Several Rules incorporate local state practice. Original Rule 81(e) provided that "the word 'state' * * * includes, if appropriate, the District of Columbia." The definition is expanded to include any commonwealth or territory of the United States. As before, these entities are included only "where appropriate." They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths, territories[, and possessions] in these and other rules avoids the gaps that otherwise would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes

uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

Adherence to a local practice may be refused as not "appropriate" when the local practice would impair a significant federal interest.

Summary of Comments:

07-CV-006: Jack E. Horsley, Esq., commenting on the Time-Computation proposals, suggests that Rule 81(c)(2) be amended: "After removal, repleading is unnecessary unless leave is granted on the party's motion or unless the court orders it."

07-CV-012: Professor Bradley Scott Shannon comments on 81(d)(1) — which was published only to indicate minor Style revisions — that the definition of state "law" is under-inclusive and might (for reasons not described) also be over-inclusive. Perhaps it should be deleted. As to (d)(2), "definitions framed only in terms of what is included, though perhaps helpful in resolving some ambiguities, can still leave a lot of unanswered questions. A better definition might be one that states specifically what is included (or, if not practicable, no definition)."

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the proposal but recommends that "possession" not be included. American Samoa is the only possible land that might fit within "possession." The Department of Justice is concerned that "'possession' might be interpreted — incorrectly — to include United States military bases overseas." Control over these bases is addressed through agreements with foreign nations.

Discussion: That Rule 81(d) be recommended for adoption with one change — the bracketed "[or possession]" be deleted. The Department of Justice has been concerned from the beginning that "possession" describes a presently null set and that it might generate confusion about such issues as the status of military bases on foreign soil. Rule 81(d)(2) would read:

> **(2)** ***"State" Defined.*** The term "state" includes, where appropriate, the District of Columbia and any United States Commonwealth~~,~~ or territory ~~[or possession]~~.

Changes Made after Publication and Comment

The reference to a "possession" was deleted in deference to the concerns expressed by the Department of Justice.

C. New Rule 62.1 Published in August 2007

The "indicative rulings" provisions of new Civil Rule 62.1 and new Appellate Rule 12.1 were worked out over a period of several years, culminating in parallel proposals published for comment in August 2007. It is recommended that Rule 62.1 be approved for adoption with modest wording changes.

Rule text: Rule 62.1 is recommended for adoption as published with one change. An accidental slip in transmission resulted in publication without a change in subdivision (c) that was submitted to the Standing Committee and approved for publication. As published, subdivision (c) refers to remand "for further proceedings." The version approved for publication refers to remand "for that purpose." This version is better for at least two reasons. It tracks the language of subdivision (a)(3). And it clearly limits (c) to a remand to act on the motion pending in the district court. The published reference to a remand for further proceedings could include remand after the court of appeals has decided not to remand for proceedings on the pending motion and has decided the appeal on grounds that both moot the motion and require further proceedings on other issues.

This recommendation is compatible with proposed Appellate Rule 12.1(b), which refers to remand "for further proceedings." The focus of Rule 12.1(b) and its Committee Note is on the scope of the remand, a question that concerns the court of appeals in the first instance.

Committee Note: The Committee Note should be revised to more accurately reflect the language of Rule 62.1(a)(3) and the distinction between limited and full remand. Rather than refer to remand of the "case" or "action," the Note should refer to remand "for that purpose." As shown below, the third sentence of the first paragraph would read: "But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the ~~action is remanded~~ court of appeals remands for that purpose or state that the motion raises a substantial issue." The first sentence of the fourth paragraph would read: "Often it will be wise for the district court to determine whether it in fact would grant the motion if the ~~case is remanded~~ court of appeals remands for that purpose."

Other changes are made in the Committee Note to conform to the Committee Note for proposed Appellate Rule 12.1. The lengthiest change is the addition of two new sentences in parentheses at the end of the first paragraph. These new sentences address a fine-point aspect of Appellate Rule 4: filing a notice of appeal does not establish a "pending" appeal if a timely post-judgment motion suspends the effect of the notice.

New Rule 62.1 is recommended for adoption:

Rule 62.1 Indicative Ruling on Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for ~~further proceedings~~ that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the ~~action is remanded~~ the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced ~~appeal~~ lawyers often refer to the suggestion for remand as an "indicative ruling." (The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate

permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the ~~case is remanded~~ court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Summary of Comments

07-CV-012: Professor Bradley Scott Shannon thinks the proposal "eminently pragmatic," but objects that a court that does not have jurisdiction should not be allowed to "decide" a matter. That "is improper, certainly as a matter of established principles of American legal process, if not also as a matter of constitutional justiciability."

07-CV-015: Hon. Jeffrey S. Bucholtz, Acting Assistant Attorney General, supports the proposed rule. "It should be beneficial to practitioners, who generally do not know how to address motions issued while a case is pending on appeal, and it will provide clarity to both the district courts and courts of appeals in addressing such motions."

07-CV-018: The Seventh Circuit Bar Association Committee on Rules of Practice & Procedure thinks the rule is "aimed primarily or exclusively at motions pursuant to Civil Rule 60. If that indeed is the case, then the new rules or the comments might mention that fact, so as to avoid a variety of other motions being made under the new rules, such as motions for fees."

Discussion. It is recommended that Rule 62.1 be adopted as published, with the change indicated in subdivision (c).

Changes Made After Publication and Comment

The rule text is changed by substituting "for that purpose" for "further proceedings"; the reason is discussed above.

Minor changes are made in the Committee Note to make it conform to the Committee Note for proposed Appellate Rule 12.1.

II RECOMMENDATIONS FOR PUBLICATION

The Committee recommends publication for comment of amendments to Rules 26 and 56. The Rule 26 amendments address disclosure and discovery of trial-witness experts. The Rule 56 amendments completely rewrite Rule 56 to bring the procedures for seeking and opposing summary judgment into line with the better practices commonly — and often generally — observed in present practice. The standard for granting summary judgment is not affected by this proposal.

A. Rule 56: Summary Judgment

Introduction

The Rule 56 proposals described here were presented in somewhat different form for initial discussion at the January meeting of this Committee. They have been revised in later deliberations that were significantly advanced by suggestions made at the January meeting.

The proposals have been developed in a Rule 56 Subcommittee chaired by Judge Michael Baylson and refined in Advisory Committee discussions. The process was advanced by the valuable contributions of the many lawyers, judges, and academics who participated in two miniconferences in January and November 2007. Studies by the Federal Judicial Center also have provided important insights into the operation of present Rule 56. Memoranda on local rules by Jeffrey Barr and James Ishida of the Rules Committee Support Office demonstrated the widespread adoption and great variety of local rules. Andrea Kuperman contributed memoranda on two issues — discretion to deny summary judgment despite the apparent lack of a genuine dispute and the practice of "deeming admitted" a statement of fact to which there is no proper response as required by a local rule. The materials attached to this report are limited to those that are new since January — the two Kuperman memoranda and the most recent FJC report.

The purpose of these proposals was described in presenting them last January. They represent an effort to improve the procedures for making and opposing summary-judgment motions, and to facilitate the judge's work in resolving them. From the beginning, the Committee has been determined that no change should be attempted in the summary-judgment standard or in the assignment of burdens between movant and nonmovant. The amendments are designed to be neutral as between plaintiffs and defendants. The aim is a better Rule 56 procedure that increases the likelihood of good motions and good responses, and deters bad motions and bad responses. No prediction is offered whether the result will be more or fewer motions, or more or fewer summary judgments. Improved procedures may, for example, reduce strategic use of summary-judgment motions as a short-cut means to discover an adversary's positions and evidence or as unworthy means of increasing delay and expense. The need to identify clearly the facts the movant asserts cannot be genuinely disputed, and to point directly to the record materials that support the assertion, should discourage motions with little or no chance of success. Even if an ill-founded motion is made, clear presentation will facilitate an efficient response and prompt denial. Improved procedures, on the other hand, may encourage well-founded motions and focused responses, facilitating well-informed decision.

Rule 56 has been held on the Civil Rules agenda for several years following an attempt at thorough revision that failed in 1992; a summary of that attempt was attached to the January report. It was brought back for active consideration both because of the integral relationships among pleading, discovery, and summary judgment and because of reasons intrinsic to evolving summary-judgment practice.

The Advisory Committee has worked on discovery, and has considered notice pleading, for many years. Efforts to achieve fully satisfactory discovery practices have continued without surcease for forty years and show no sign of abating. Notice pleading, the gateway to discovery, has been the subject of puzzled attention for nearly twenty years, and has been brought back to the fore by the *Twombly* decision discussed in the insightful panel discussion last January. Summary judgment is widely recognized as the third main component of the 1938 revolution that established notice pleading and sweeping discovery. The Subcommittee and Advisory Committee unanimously

agreed that improvements in summary judgment procedure, made without changing the standard for summary judgment or the related moving burdens, can improve the role of summary-judgment as the third leg of the notice-pleading, discovery, summary-judgment stool.

More concrete considerations supplemented these overarching concerns. Rule 56 has not been amended, apart from the Style Project, for many years. Practice has grown increasingly out of touch with the present rule text. Most districts have adopted local rules to supplement the national rule. These local rules have provided ideas and experience that have played a central role in developing the proposed amendments. The laboratories provided by individual districts, separately and collectively, have proved invaluable. At the same time, the local rules are not uniform, and at times mandate practices that are inconsistent from one district to another. It is useful, and increasingly important, to restore greater uniformity through a national rule that builds on the most successful local rules as well as on proliferating interpretations of present Rule 56 text.

It bears emphasizing again that the summary-judgment project began with the determination that the standard for granting summary judgment should not be reconsidered. Restatement of the summary-judgment burdens also was placed off-limits because the burdens are closely tied to the standard. It is better to leave these matters to continuing evolution under the 1986 Supreme Court decisions that have guided practice for the last twenty years and more.

The importance of the preview discussion last January also bears repeating. The rule text has been improved at several points. The improvements are in part better expression of persisting concepts, but also in part better understanding of the relationships among the subdivisions. Following a brief descriptive overview, these improvements are highlighted in the detailed description of the proposal, along with suggestions of the most important topics for discussion. In addition to the changes in rule text, the Committee Note has been considerably shortened in response to the continuing emphasis on brevity.

Overview

Proposed Rule 56 and the accompanying Committee Note are set out below. The rule-text revisions are so extensive that a traditional comparison draft showing changes by over- and underlining would serve little purpose. A clean copy of present Rule 56 is provided for purposes of comparison.

Subdivision (a): This subdivision carries forward from present Rule 56(c) the familiar standard for summary judgment, changing only one word. "Genuine issue" becomes "genuine dispute." The Committee Note emphasizes that the change does not affect the summary-judgment standard. "Dispute" is chosen because it focuses directly on the question to be decided, and also because it facilitates drafting later subdivisions. Subdivision (a) also provides a clear statement that summary judgment may be sought on an entire action, on a claim or defense, or on part of a claim or defense. Finally, this subdivision provides an explicit direction that the court should state the reasons for granting or denying summary judgment.

Subdivision (b): This subdivision establishes the times for motion, response, or reply. It carries forward the times provided by the Time-Computation Project amendments, adapted to the new Rule 56 structure.

Subdivision (c): This subdivision establishes a comprehensive procedure for presenting and resisting a summary-judgment motion. The motion is presented in three parts — the motion itself, a statement of facts that cannot be genuinely disputed, and a brief; a response that addresses each stated fact and may state additional facts that preclude summary judgment, along with a brief; and a reply to any additional facts stated in the response, again with a brief. Requirements are established for supporting positions on the facts. Common practice is recognized by stating that a court need consider only materials called to its attention by the parties, but may consider other materials in the record. Provision is made for stating in a response or reply that materials cited to support a fact position are not admissible in evidence. And the familiar provisions allowing consideration of affidavits or declarations are carried forward with some changes.

Subdivision (d): This subdivision carries forward with few changes the provisions of present subdivision (f) that protect a nonmovant who needs an opportunity for further investigation or discovery to support a response.

Subdivision (e): This subdivision addresses the consequences of failing to reply, or replying in a way that does not comply with the requirements of subdivision (c). The first action listed is likely to be the first action in most cases — a reminder of the need to respond in proper form and an opportunity to do so. The second action is discretionary — the court may consider a fact undisputed. The third action is to grant summary judgment if the facts, including facts considered undisputed, satisfy the summary-judgment standard. The fourth action is "any other appropriate order."

Subdivision (f): This subdivision recognizes well-established practices in granting summary judgment for a nonmovant, granting or denying a motion on grounds not raised in the motion or response, or considering summary judgment on the court's own. Notice and a reasonable time to respond must be provided.

Subdivision (g): This subdivision supplements subdivision (a)'s recognition of summary judgment on all or part of a claim or defense. The focus here is on a ruling that grants less than all the relief requested by the motion. The court first considers the motion, applying the summary-judgment standard as directed by subdivision (a). Then if the court does not grant all the requested relief the court has discretion to enter an order stating any material fact that is not in genuine dispute.

Subdivision (h): This subdivision carries forward present subdivision (g) with one significant change. Rather than directing that the court "must" order sanctions, this provision says that the court "may" order sanctions.

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment on all or part of a claim or defense. The court should grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying summary judgment.

(b) Time for a Motion, Response, and Reply. These times apply unless a different time is set by local rule or the court orders otherwise in the case:

(1) a party may file a motion for summary judgment

at any time until 30 days after the close of all discovery;

(2) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(3) any reply by the movant must be filed within 14 days after the response is served.

(c) Procedures.

(1) ***Case-specific procedure.*** The procedures in this subdivision (c) apply unless the court orders otherwise in a case.

(2) ***Motion, Statement, and Brief; Response, Statement, and Brief; Reply and Brief.***

(A) *Motion, Statement, and Brief.* The movant must simultaneously file:

(i) a motion identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought;

(ii) a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment; and

(iii) a brief setting forth its contentions on the law or the facts.

(B) *Response, Statement, and Brief by the Opposing Party.* A party opposing summary judgment:

(i) must file a response that includes a statement that, in correspondingly numbered paragraphs, accepts or disputes — or accepts in part and disputes in part — each fact in the movant's statement;

(ii) may in the response concisely identify in separately numbered paragraphs additional material facts that preclude summary judgment; and

(iii) must file a brief setting forth its contentions on the law or facts.

(C) *Reply and Brief.* The movant:

(i) must file, in the form required by Rule 56(c)(2)(B)(i), a response to any additional facts stated by the nonmovant; and

(ii) may file a reply brief.

(3) ***Dispute Generally or for Purposes of Motion Only.*** A party may accept or dispute a fact either generally or for purposes of the motion only.

(4) ***Citing Support for Statements or Disputes of Fact; Materials Not Cited.***

(A) A statement that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

(i) citation to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(ii) a showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(B) The court need consider only materials called to its attention under paragraph (A), but it may consider other materials in the record:

(i) to establish a genuine dispute of fact; or

(ii) to grant summary judgment if it gives notice under Rule 56(f).

(5) ***Assertion that Fact is Not Supported by Admissible Evidence.*** A response or reply to a

statement of fact may state without argument that the material cited to support the fact is not admissible in evidence.

(6) ***Affidavits or Declarations.*** An affidavit or declaration used to support a motion, response, or reply must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failure to Respond or Properly Respond. If a response or reply does not comply with Rule 56(c) — or if there is no response or reply — the court may:

(1) afford an opportunity to properly respond or reply;

(2) consider a fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and

supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant or deny the motion on grounds not raised by the motion or response; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Partial Grant of the Motion. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Committee Note

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that a party be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases. The source of contemporary summary-judgment standards continues to be three decisions from 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; and *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying summary judgment. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment; the statement may be dispensed with only when the reasons are apparent both to the parties and to an appellate court. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) [were consolidated and substantially revised as part of the time computation amendments that took effect in 2009.] These provisions are adapted by new subdivision (b) to fit the context of amended Rule 56. The timing for each step is directed to filing.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for summary-judgment motions synthesized from similar elements found in many local rules.

The subdivision (c) procedure is designed to fit the practical needs of most cases. Paragraph (1) recognizes the court's authority to direct a different procedure by order in a case that will benefit from different procedures. The order must be specifically entered in the particular case. The parties may be able to agree on a procedure for presenting and responding to a summary-judgment motion, tailored to the needs of the case. The court may play a role in shaping the order under Rule 16.

The circumstances that will justify departure from the general subdivision (c) procedures are variable. One example frequently suggested reflects the (c)(2)(A)(ii) statement of facts that cannot be genuinely disputed. The court may find it useful, particularly in complex cases, to set a limit on the number of facts the statement can identify.

Paragraph (2) spells out the basic procedure of motion, response, and reply. It identifies the methods of supporting the positions asserted, recognizes that the court is not obliged to search the record for information not cited by a party, carries forward the authority to rely on affidavits and declarations, and directs that contentions as to law or fact be set out in a separate brief.

Subparagraph (2)(A) directs that the motion must describe each claim, defense, or part of each claim or defense as to which summary judgment is sought. A motion may address discrete parts of an action without seeking disposition of the entire action.

The motion must be accompanied by a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment. Many local rules require, in varying terms, that a motion include a statement of undisputed facts. In some cases the statements and responses have expanded to identification of hundreds of facts, elaborated in hundreds of pages and supported by unwieldy volumes of materials. This practice is self-defeating. To be effective, the motion should focus on a small number of truly dispositive facts.

The response must include a statement that, by correspondingly numbered paragraphs, accepts, disputes, or accepts in part and disputes in part each fact in the Rule 56(c)(2)(A)(ii) statement. Under Rule 56(c)(3), a response that a material fact is accepted or disputed may be made for purposes of the motion only.

The response may go beyond responding to the facts stated to support the motion by concisely identifying in separately numbered paragraphs additional material facts that preclude summary judgment.

The movant must reply — using the form required for a response — only to additional facts stated in the response. The reply may not be used to address materials cited in the response to dispute facts in the statement accompanying the motion. Except for possible further rounds of briefing, the exchanges stop at this point. A movant may file a brief to address the response without filing a reply, but this brief cannot address additional facts stated in the response unless the movant files a reply.

Subdivision (c)(4)(A) addresses the ways to support a statement or dispute of fact. Item (i) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support the facts. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. A party's direction to a specific location in an appendix satisfies the citation requirement. So too the court may find it convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(4)(A)(ii) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(4)(B) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties. Consideration is more likely to be appropriate when uncited material shows there is a genuine dispute. If the court intends to rely on uncited record material to grant summary judgment it must give notice to the parties under subdivision (f).

Subdivision (c)(5) provides that a response or reply also may be used to challenge the admissibility of material cited to support a fact. The challenge can be supported by argument in the brief, or may be

made in the brief alone. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(6) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(4)(A)(i) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) should consider seeking an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a response or reply does not comply with Rule 56(c) requirements or when there is no response or no reply to additional facts stated in a response. Summary judgment cannot be granted by default even if there is a complete failure to respond or reply, much less when an attempted response or reply fails to comply with all Rule 56(c) requirements. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to respond or reply in proper form.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of direct facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper responses and replies. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party, grant or deny a motion on grounds not raised by the motion or response, or consider summary judgment on its own. In many cases it may prove useful to act by inviting a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion under subdivision (c)(2)(A)(i). Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute.

If it is readily apparent that summary judgment cannot be granted the court may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from entering partial summary judgment on that fact. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated — perhaps at little cost — by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with two changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. See Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56(g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond.

Current Federal Rule of Civil Procedure 56

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any

material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) ***Establishing Liability.*** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) ***In General.*** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to

interrogatories, or additional affidavits.

(2) ***Opposing Party's Obligation to Respond.*** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the

other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Detailed Discussion and Questions

Subdivision (a): Motion

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment on all or part of a claim or defense. The court should grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying summary judgment.

Partial Summary Judgment — "All or part of a claim or defense": Courts and litigants regularly refer to "partial summary judgment," although that phrase does not appear in present Rule 56. This draft distinguishes two concepts. The first is "partial summary judgment," which may occur either because the movant seeks summary judgment only on part of the action — a claim, defense, or part of a claim or defense — or because a motion for summary judgment on the entire action is not granted in full. The second concept, expressed in proposed subdivision (g) and anchored in present Rule 56(d), addresses the situation in which the court, after applying the summary-judgment standard to the motion as presented, does not grant all the relief requested by the motion.

These concepts are implemented in two distinct steps. The first step, subdivision (a), invokes all the force of the direction that the court "should" grant summary judgment, a direction discussed next below. The court must make this determination before considering the second step. The second step, subdivision (g), invokes discretion to determine whether it remains useful to establish a material fact as not genuinely in dispute even though the court has not granted all the relief requested by the motion. Earlier drafts left this distinction in a state of some confusion, reflected by the Standing Committee discussion last January. The present draft is designed to express the distinction more clearly.

The question whether the rule should say "summary judgment on the whole action or on all or part of a claim or defense" has been discussed repeatedly. The question is purely one of style. The Style convention is that singular expression always embraces the plural: the text authorizes a motion on every claim or defense. The Committee Note says that summary judgment may be requested as to an entire case.

"Should" grant summary judgment — Discretion to deny: From 1938 to 2007, Rule 56(c) said that "the judgment sought *shall* be rendered forthwith * * *." Style Rule 56(c) translated "shall" as "should." The Committee Note observed: "'[S]hall' is changed to 'should.' It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. Kennedy v. Silas Mason Co., 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. 'Should' in amended rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue."

At least until December 1, 2010, Rule 56(c) will continue to say "should." Preliminary research has not uncovered any cases addressing reactions to this word.

Some observers continue to argue that "should" should have been translated as "must," and ought to be changed to "must" in the new Rule 56. When pressed, they would prefer "shall" to "should." Their concern is that "should" may exacerbate what they see as an unfortunate tendency of some judges to delay or entirely omit any ruling on a summary-judgment motion in the hope that uncertainty will press the parties to settle. Their fall-back position is that at the very least the Committee Note should repeat and entrench the advice in the 2007 Committee Note that discretion should seldom be exercised to deny summary judgment when the motion and response show there is no genuine fact dispute.

The Subcommittee and Committee repeatedly considered and rejected the suggestion that "must" ought to be substituted for "should." This spring the Subcommittee asked Andrea Kuperman to research the cases that recognize discretion to deny summary judgment. Her memorandum is attached. It identifies a number of decisions supporting this discretion. Many of the cases that seem contrary are simply examples of routine statements of the general practice of reviewing summary judgment as a matter of law, made on appeal from orders granting summary judgment. The only clear statement rejecting discretion on appeal from an order denying summary judgment was made in a case involving a defense of official immunity. Although the statement does not focus on the special substantive role of official immunity, the context is special. Official immunity is established as a protection not only against liability but also against the burdens of trial and even the burdens of pretrial proceedings, including discovery. It may well be that the substantive law of official immunity will develop into an explicit principle that eliminates discretion to deny summary judgment on one claim even when the same underlying facts must continue through pretrial and trial on closely related claims. That is a matter for substantive law, to be honored by procedural law.

Some measure of discretion seems indispensable. The clearest example is provided by motions or rulings that limit summary judgment to only part of a case. The determination whether some part meets the "no genuine dispute" test may be close to the margin, uncertain as to grant or denial. Other parts may clearly be in dispute, and involve facts that closely overlap the part that might be appropriate for summary judgment. Trial on the parts that must be tried may require as much effort as trial on all parts, illuminate the facts in ways that show summary judgment would not be appropriate on any part, and protect against the risk that the partial summary judgment will be reversed after appeal from the final judgment at great cost in duplicating proceedings.

Short of abandoning "should" in the rule text, the Committee Note could be used to repeat the cautions expressed in the 2007 Committee Note. Earlier drafts did that. The Note also might be used to recognize that special substantive principles, such as official immunity, may defeat the general (but limited) discretion to deny summary judgment. In the end it was considered unwise to use the Note for these purposes. Verbatim repetition of the 2007 Note would be redundant. Variations on the 2007 Note could easily be seen as an effort to change the meaning of the rule text without changing the text. And reflections on possible developments of substantive law should be offered in a Committee Note, if at all, only for compelling reasons.

Genuine dispute: Despite the good reasons for adhering to the iconic "no genuine issue as to any material fact" formula of present Rule 56(c), it has seemed better to change "issue" to "dispute." "Dispute" directly addresses the functional question. And it enables clear drafting throughout the rest of the rule.

State reasons for acting: Many courts of appeals repeatedly remind trial courts of the need to explain the reasons for granting summary judgment. The need to explain the reasons for denying summary judgment is not as frequently remarked, apart from official-immunity appeals where it is important to know what genuine disputes were found. The draft presented for discussion last January resolved Advisory Committee uncertainties by providing that the court "must" state the reasons for granting

summary judgment and "should" state the reasons for denying it. Further discussion led the Subcommittee to recommend, and the Committee to approve, the present proposal that the court "should" state the reasons for either granting or denying summary judgment. The Committee concluded that the reasons for granting summary judgment are so obvious in some cases that nothing would be gained by requiring the court to restate the obvious.

Subdivision (b): Time

(b) Time for a Motion, Response, and Reply. These times apply unless a different time is set by local rule or the court orders otherwise in the case:

(1) a party may file a motion for summary judgment at any time until 30 days after the close of all discovery;

(2) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(3) any reply by the movant must be filed within 14 days after the response is served.

Time: These time provisions are adapted from the provisions published as part of the Time-Computation Project. They are designed as "default" provisions to apply in cases not governed by a scheduling order. It is expected that most cases will be governed by scheduling orders entered "in a case."

Each of the time provisions is measured by filing, an explicit event easily identified. Filing also is used in the procedural provisions of subdivision (c).

Subdivision (c): Procedure

(c) Procedures.

(1) ***Case-specific procedure.*** The procedures in this subdivision (c) apply unless the court orders otherwise in a case.

(2) ***Motion, Statement, and Brief; Response, Statement, and Brief; Reply and Brief.***

(A) *Motion, Statement, and Brief.* The movant must simultaneously file:

(i) a motion identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought;

(ii) a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment; and

(iii)a brief setting forth its contentions on the law or the facts.

(B) *Response, Statement, and Brief by the Opposing Party.* A party opposing summary judgment:

(i) must file a response that includes a statement that, in correspondingly numbered paragraphs, accepts or disputes — or accepts in part and disputes in part — each fact in the movant's statement;

(ii) may in the response concisely identify in separately numbered paragraphs

additional material facts that preclude summary judgment; and

(iii) must file a brief setting forth its contentions on the law or facts.

(C) *Reply and Brief.* The movant:

(i) must file, in the form required by Rule 56(c)(2)(B)(i), a response to any additional facts stated by the nonmovant; and

(ii) may file a reply brief.

(3) ***Dispute Generally or for Purposes of Motion Only.*** A party may accept or dispute a fact either generally or for purposes of the motion only.

(4) ***Citing Support for Statements or Disputes of Fact; Materials Not Cited.***

(A) A statement that a fact cannot be genuinely disputed or is genuinely disputed must be supported by:

(i) citation to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(ii) a showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(B) The court need consider only materials called to its attention under paragraph (A), but it may consider other materials in the record:

(i) to establish a genuine dispute of fact; or

(ii) to grant summary judgment if it gives notice under Rule 56(f).

(5) ***Assertion that Fact is Not Supported by Admissible Evidence.*** A response or reply to a statement of fact may state without argument that the material cited to support the fact is not admissible in evidence.

(6) ***Affidavits or Declarations.*** An affidavit or declaration used to support a motion, response, or reply must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

"Orders otherwise in a case": Subdivision (c)(1) recognizes the authority to depart from the general procedures set out in paragraphs (2) through (6) by order in a case. The Committee believes that these procedures are well adapted to the needs of most cases. But it is clear that some cases, particularly complex cases, will require different procedures tailored to particular needs. More generally, docket conditions, local practice, or the preferences of an individual judge may make it desirable to establish different procedures either through a scheduling order or pretrial conferences. The parties to a particular case also may find it desirable to agree on different procedures; their agreement may be confirmed by order, although the court remains free to reject an agreed order for reasons of effective case management.

The Committee Note observes that one reason for entering a case-specific order may be to limit the number of facts a party may assert cannot be genuinely disputed. This possibility is noted with subdivision (c)(2)(A)(ii).

Authority to depart by order in a case does not authorize local rules inconsistent with the national rule. Many districts have adopted local rules governing summary-judgment motion practice. These local rules have generated many of the ideas incorporated in these amendments. Not surprisingly, some local rules provisions are inconsistent with parallel provisions in the local rules of other courts. So too some are inconsistent — or at least fit poorly — with some of these amendments. Local rules committees should review their local rules to ensure they continue to meet the Rule 83 standard that they be consistent with and not duplicate Rule 56.

Authority to depart by order in a case also does not authorize "standing orders" that are entered in general terms but not specifically entered in a particular case. Rule 56, however, does not prevent a judge from entering in every case the same specific order departing from subdivision (c) procedures. Entry of the order in the specific case gives the parties clear notice of what is expected. The parties as well as the judge are likely to be better served by procedures that work best for that judge. But it is hoped that the subdivision (c) procedures will work well for most judges, obviating any need for routine orders establishing different procedures that do not respond to the particular needs of particular cases.

(c)(2)(A) — Motion: Subparagraph (A) adopts a three-document approach to the motion. The first document is a "motion" identifying the subjects on which summary judgment is sought. The second is a statement of facts that the movant asserts cannot be genuinely disputed. The third is a brief. These three documents establish the basic foundation for the subsection (c) procedure. They pave the way for a point-counterpoint practice in which the motion both identifies the facts and cites materials supporting them, to be met by a response that addresses the same facts and provides equally focused counter-citations.

The statement of material facts addresses facts "that the movant asserts cannot be genuinely disputed." Many local rules call for statements of "undisputed facts." Although this term is familiar, it has generated some conceptual confusion when addressing a "no-evidence" motion made by a party who does not have the trial burden of production. A statement that the facts cannot be genuinely disputed better describes a "no-evidence" motion, which can be made by listing one or more elements of the nonmovant's claim or defense and stating the nonmovant has no evidence to support its position.

Lawyers who regularly litigate complex cases have expressed important reservations about statements of facts that cannot be genuinely disputed. They refer to motions with more than a hundred pages of facts that are asserted to be beyond dispute, with still lengthier responses and huge volumes of supporting materials. "The motions come in boxes." Suggestions that the rule establish a numerical limit on the number of facts that could be asserted were dismissed as too difficult to implement in any appropriate way. This problem is addressed by observations in the Committee Note, primarily as a reminder of the court's authority to take control under subdivision (c)(1).

(c)(2)(B) — Response: The response comes in two documents, not three. The first, the "response" itself, must include a statement that accepts, disputes, or accepts in part and disputes in part, each fact in the statement that accompanies the motion. The response must adopt the paragraph numbering used in the movant's statement. The response also may concisely identify, in separately numbered paragraphs, additional material facts that preclude summary judgment. The second document is a brief.

(c)(2)(C) — Reply: The movant must reply to the response, but only to any "additional facts" stated in the response. The movant may file a reply brief even if there is no reply. The formal exchanges stop at this point.

(c)(3) — Fact positions limited to motion: Paragraph (3) recognizes that a party may accept or dispute a fact either generally or for purposes of the motion only. This provision is inspired in part by provisions in some local rules recognizing the opportunity to stipulate to facts solely for purposes of summary judgment.

(c)(4)(A) — Citing support: Subdivision (c)(4)(A)(i) is an essential element of the point-counterpoint procedure. It does not suffice to assert that a fact cannot be genuinely disputed. The most common additional step is to rely on record materials that show the fact cannot be disputed. The same step is commonly taken in a response that disputes a fact. Item (i) identifies the variety of materials commonly relied upon to support summary-judgment positions. It is important to carry forward the familiar authority to rely on affidavits or declarations because they otherwise might be excluded from consideration as inadmissible at trial. The same proposition holds for many of the discovery materials listed — they may, but also may not, be admissible at trial.

The materials cited must be "in the record." Earlier drafts explicitly required that a party file materials not already on file. That function is satisfied, however, by limiting citation to materials in the record — the party must file them in order to cite them. For similar reasons, the rule text omits the direction in present subdivision (e)(1) to attach to an affidavit a paper referred to in the affidavit. If the paper is not in the record, it cannot be cited to support a party's position.

(c)(4)(A) — Disputing support: Subdivision (c)(4)(A)(ii) is a necessary complement to (A)(i). A party opposing summary judgment is not obliged to cite to any new parts of the record; it suffices to respond that the materials cited by the movant do not show the fact cannot be genuinely disputed. And a party who does not have the trial burden of production on a fact may move for summary judgment by "showing" that the nonmovant cannot produce admissible evidence to support the fact. This showing is not an argument — arguments are to be made in the brief — but a statement based on the record and anything the nonmovant has relied on to identify and support its position. This rule text does not attempt to resolve the continuing uncertainty among some courts and the bar as to just what "showing" is required to carry the "Celotex no-evidence" motion. An attempt to resolve that vexing question once and for all would, at least to some minds, alter the summary-judgment moving burden in a way that effectively changes the standard for granting summary judgment. This problem is deliberately left for resolution in evolving case law.

(c)(4)(B) — materials not cited: This subdivision begins with an explicit statement of the well-accepted proposition that a judge is not required to ferret through all materials in the record before deciding a summary-judgment motion. The parties are responsible for directing the court to the relevant materials under subdivision (c)(4)(A) and the judge need inquire no further. The rule further recognizes, however, that the judge has discretion to consider materials of record not called to its attention under (c)(4)(A). The more common event will be the court's recall of, or voluntary search for, materials that defeat summary judgment. But the court also has authority to grant summary judgment on the basis of record materials not cited to support the motion. Before granting summary judgment by relying on materials not cited, however, the court must give notice under Rule 56(f). Notice will provide an opportunity both to point to still other record materials that show a genuine dispute and to add such materials to the record.

(c)(5) — Inadmissibility of cited material: Many lawyers at the November 2007 miniconference asked for explicit direction on the proper formal procedure for presenting the position that material cited to support a fact is not admissible in evidence. They did not much care what the procedure might be, so long as the rule is clear. Subdivision (c)(5) provides that a response or reply can state this position "without argument." Argument is for the brief. The Committee Note adds detail: the point can be made in the brief without separately including it in the response or reply. Either way, there is no need to make a separate motion to strike. And failure to raise the point at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

(c)(6) — Affidavits or declarations: Subdivision (c)(6) carries forward the requirements for summary-judgment affidavits established by present Rule 56(e)(1). The Committee has restored the reference to "declarations" rejected by the Style Subcommittee on reviewing an earlier draft. The Style Subcommittee concern is that referring to declarations only in Rule 56 may create negative implications for other rules that refer only to affidavits. The Committee, however, fears two nearly opposing risks. One is that younger lawyers habituated to using declarations under 28 U.S.C. § 1746 will wonder what an affidavit might be. The other is that lawyers long accustomed to dealing with the more cumbersome affidavit procedure of a formally witnessed oath will overlook the alternative opportunity to rely on a declaration.

Subdivision (d)

(d) When Facts Are Unavailable. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Present Rule 56(f) largely unchanged: The Committee considered the possibility of adding some additional guidance as to the factors to be considered in determining whether to allow time for additional investigation or discovery. A survey of the case law by Matt Hall, Judge Levi's rules clerk, persuaded the Committee that the attempt would be unwise. It would be difficult to capture in rule text the wide variety of factors courts consider. The decisions, moreover, seem to reflect basically sound procedure.

"Defer consideration": Proposed subdivision (d) basically tracks present Rule 56(f), with some further style changes proposed by the Style consultant. It does add one element, explicitly recognizing the authority to defer consideration as well as to deny the motion. Earlier drafts of the Committee Note explained the purpose in language that has been deleted: It may be better to deny a motion that is clearly premature, without prejudice to filing a new motion after further discovery. Further discovery may so change the record that both the statement of material facts required by subdivision (c)(2)(A)(ii) and the record citations required by subdivision (c)(4)(A) will have to be substantially changed. Ordinarily the denial will be without prejudice to renewal when the record is better developed, although a pressing need for prompt decision may mean that a case should proceed to trial without the delay occasioned by consideration of summary judgment. Rather than deny the motion, it may be feasible to defer consideration if there is a prospect that it can be addressed without substantial change after further discovery.

Subdivision (e): Missing or Noncomplying Response or Reply

(e) Failure to Respond or Properly Respond. If a response or reply does not comply with Rule 56(c) — or if there is no response or reply — the court may:

(1) afford an opportunity to properly respond or reply;

(2) consider a fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

Noncomplying motion: Some participants in the November 2007 miniconference protested that it seemed one-sided — and that one side is pro-defendant — to address only noncomplying responses and replies without also addressing noncomplying motions. The Committee considered a draft that added noncomplying motions to the rule text without adding much complexity. In the end it decided that there is no need to add unnecessary provisions simply to add an apparent reassurance that no favoritism is implied. Courts have ample experience in dealing with improperly presented motions of all sorts. They have equally ample resources to deal with them. Noncompliance, moreover, can come in many forms. The appropriate responses take as many forms, beginning with a decision to overlook the noncompliance just as noncompliance in a response or reply may be passed by in favor of addressing the substance of the positions advanced, however unartfully.

As an alternative to rule text, the Committee considered, but decided against, expanding the Committee Note to identify these issues by adding this language: "The rule text does not address defective motions because courts have general approaches to dealing with defective motions of all kinds, and because there are a variety of defects that may call for different responses. Among many different defects, the movant may make two documents where there should be three; make compound or unclear statements of fact; fail to file cited materials not already on file; or fail to cite supporting materials clearly or at all. A wrong choice to combine motion and statement of facts in a single document might easily be overlooked. Failure to cite supporting materials ordinarily will be met by an order to provide the citations or by denying the motion. Failures of intermediate seriousness may be met by different measures. Any provision in rule text would be incomplete and potentially misleading." The advice came to seem purely gratuitous.

Opportunity to comply: Subdivision (e)(1) recognizes the response that is likely to be the first resort of most courts in most cases. A party who has failed to make a timely response or reply will be directed to respond or reply. A party who has attempted to respond or reply but who has not succeeded in complying with Rule 56(c) will be directed to correct any deficiencies that impede the court's ability to consider the motion. These responses are particularly common in actions that involve a pro se party.

Consider undisputed: Subdivision (e)(2) addresses a central question raised by the local rules that establish point-counterpoint procedures similar to the procedures set out in subdivision (c). The local rules commonly provide that failure to respond to the statement of "undisputed facts" point-by-point, with appropriate references to the record, authorizes the court to "deem admitted" the facts not addressed by a proper response. The memorandum prepared by Andrea Kuperman illustrates the variety of approaches taken by the courts of appeals in reviewing summary judgments that rest in part on facts deemed admitted. Some decisions clearly require the court to examine the materials cited by the movant to determine whether those materials support the fact asserted. Others seem to imply that the court can deem the fact admitted without examining the movant's cited materials.

The Committee's approach to this problem evolved through a series of drafts. The earliest drafts required the court to apply the ordinary summary-judgment standard to the materials cited by the movant, allowing summary judgment only if the movant had carried the full summary-judgment burden. On this approach the only price for failing to respond, or to respond in proper form, was loss of the opportunity to have the court consider other materials that might show a genuine dispute. These drafts gave way to an approach that attaches more serious consequences to the nonmovant's failure to respond in compliance with subdivision (c). This approach, as reflected in the present draft subdivision (e)(2), establishes discretionary authority to consider the fact undisputed. The court may adjust its approach to the circumstances of the case.

Alternatives were considered at length. One would have attempted to provide a specific formula. A fact might be considered undisputed "if: (i) supported by citation to record materials that would satisfy the movant's burden of production at trial, or (ii) supported by an apparent showing that the nonmovant could not satisfy its burden of production at trial." This formula would not

require that the full summary-judgment burden be satisfied. A plaintiff, for example, might support a statement that the defendant went through a red light by citing the plaintiff's own deposition testimony. A jury would not be required to believe the plaintiff at trial; summary judgment for the plaintiff would not be proper if the defendant responded, even with a simple (and correct) statement that the material cited did not show that the fact cannot be disputed. The question is a bit trickier for the "no-evidence" motion made by a party who does not have the trial burden; to distinguish the showing required to support a "considered undisputed" finding from the showing required to win summary judgment over a properly framed response, the requirement is reduced to an "apparent" showing.

The conceptually clean formulation found little or no support. Conceptual clarity does not always translate to ready understanding and application. The practical world of summary judgment is difficult enough without forcing application by unfamiliar concepts.

An alternative considered at greater length resorted to some measure of deliberate ambiguity. In one set of words or another, it would have allowed the court to consider a fact undisputed if the fact "is supported by the record" or "is supported by the materials cited by the movant." These formulas seek to seize the value that occasionally attaches to ambiguous drafting. The court is directed to look for "support," but no attempt is made to capture the factors that measure the adequacy of that support. Champions of this approach urge that it strikes exactly the right note. Courts will understand that discretion is properly informed by many considerations, some of them difficult to articulate. This is, after all, discretion in determining the consequences of a failure to discharge the obligation to assist the court by a proper response or reply; all discretion whether to grant summary judgment vanishes on filing a proper response or reply.

Those who resisted adding a direction to consider the movant's support for a fact not properly responded to thought it inappropriate to add an open-ended direction to do what courts will do in any event. Courts will administer the discretionary authority to consider a fact undisputed in light of all the circumstances and experiences of the case up to the time of the summary-judgment motion. Why add a direction that some courts might read as implying unintended limits on wise administration?

The question whether to add a direction to look for support was closely debated. Public comment will be particularly helpful.

(e)(3) — Grant summary judgment. This subdivision has been revised to address uncertainties expressed during the discussion last January. The uncertainties arose from a drafting history that had not quite caught up with the development of Committee positions. As noted above, the position embodied in the early drafts eschewed any opportunity to consider a fact undisputed; the court could find a fact established beyond genuine dispute only on determining that the movant's cited materials carried the full summary-judgment burden. Development of the authority to consider a fact undisputed was not clearly matched by the text of (e)(3). The current draft seeks to state clearly the role of facts considered undisputed.

Taking one or more facts as undisputed is only one step toward granting summary judgment. Failure to respond properly, or at all, does not warrant summary judgment by default. There may have been a proper response as to other facts, or the court may decline to consider some facts undisputed even when it could do so. Facts considered undisputed thus may need to be combined with other facts that will be established for purposes of summary judgment only if the movant has carried the full summary-judgment burden. Once these basic facts are established, the court must apply the ordinary summary-judgment rule by determining the outer limit of permissible inferences favoring the nonmovant. Care must be taken at this stage to separate the historic facts considered undisputed from the inferential facts that are not the subject of any direct evidence. The combination of basic facts and permissibly inferred facts must then be measured against the applicable substantive law.

This, then, is the purpose of adding these new words to the draft: "grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it." The facts considered undisputed, after whatever level of examination was afforded under subdivision (e)(2), become simply one part of the foundation for deciding whether the summary-judgment standard has been met.

(e)(4) — Other appropriate order: Subdivision (e)(4) is deliberately open-ended, leaving the way for other creative responses. The Committee Note observes, underscoring subdivision (e)(1), that "[t]he choice among possible orders should be designed to encourage proper responses and replies."

Subdivision (f): Judgment Independent of Motion

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant or deny the motion on grounds not raised by the motion or response; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Notice and time to respond: Case law recognizes each of the three categories of action listed in subdivision (f), and regularly notes that the court should give notice and an opportunity to respond before acting independently of, or contrary to, the motion. It is useful to assure that parties are aware of these possible responses by explicit rule provisions.

Invite motion: Discussion last January asked whether it would be better to invite a summary judgment motion — or a better-focused motion or response — rather than act on the court's own. The Committee Note observes that often it will be useful to invite a motion in order to trigger the full procedure established by subdivision (c). But the Committee believes that the procedure should not be limited to inviting a motion. The running illustration assumed an action against a public official and the official's municipal employer. The official's motion for summary judgment on official-immunity grounds is granted on finding there was no violation of the asserted constitutional right. The employing municipality could not have moved for summary judgment on the immunity ground. There may be no advantage in inviting a new motion; the plaintiff is sufficiently protected by notice that the court is considering summary judgment for the municipality and an opportunity to be heard on the reasons why the municipality might be liable independently of the official's conduct.

Subdivision (g): Findings after Partial Grant

(g) Partial Grant of the Motion. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

Not partial summary judgment: The evolution of subdivision (g) has been described in part with subdivision (a). It began as an attempt to express the familiar concept of partial summary judgment. The drafts, however, inadvertently provoked some deserved confusion, as illustrated by the discussion last January. Subsection (a) seemed to say the court "should" grant summary judgment on even a part of a claim or defense if there is no genuine dispute of material fact. Subsection (g), as drafted, growing out of present subdivision (d), seemed to say the court should grant partial summary judgment only "if practicable." Exploration of this inconsistency led to the conclusion that partial summary judgment should be anchored entirely in subdivision (a).

Subdivision (g) is now limited to circumstances in which the court, honoring the direction that it should grant summary judgment if there is no genuine dispute as to any material fact, does not grant all the relief requested by the summary-judgment motion. It establishes discretion to establish a fact as not genuinely in dispute for purposes of the action. This discretion is more open than the discretion to deny summary judgment even though the movant has carried the full summary-judgment burden. The reasons for establishing open-ended discretion reflect familiar concerns. The work of sifting through the record for specific facts and applying the often indeterminate summary-judgment standard may be far greater than the burden of trial. The risk that mistaken application of the summary-judgment standard may require costly appeals and retrials is real. And there is often a real prospect that the need to consider essentially the same evidence means that trial will not be shortened by setting some facts off-limits. Indeed trial might be less effective if understanding the questions that remain to be tried requires informing the jury of the facts taken as established, engendering confusion when the evidence seems to undercut those facts.

The Committee considered the offsetting risk that submitting to the jury a fact that could have been resolved by the summary-judgment standard will open the door to admitting prejudicial evidence that otherwise would not be admissible. It concluded that this risk can be taken into account in exercising the court's discretion.

Subdivision (h): Bad-Faith Affidavits or Declarations

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Discretion added: Subdivision (h) is taken directly from Style Rule 56(g), with two changes. The present rule says that the court "must" order payment of reasonable expenses. The Committee asked the Federal Judicial Center to determine whether courts actually honor the imperative command of "must." It found essentially complete disregard; sanctions are almost never imposed under this rule.

The second change adds an explicit reminder of the obligation to provide notice and a reasonable time to respond before ordering a sanction.

The Committee considered abrogation of this subdivision as an essentially inoperative supplement to the sanctions authorized by Rule 11 and 28 U.S.C. § 1927. Although the question seemed close, no compelling reason could be found to abandon this provision. The contempt authority is unique, and might be useful in a case of flagrant abuse.

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

Joe Cecil
Division of Research

TEL.: 202-502-4084
FAX: 202-502-4199
EMAIL: jcecil@fjc.gov

April 2, 2008

Memorandum

To: Judge Michael Baylson

From: Joe Cecil, George Cort, and Pat Lombard

Subject: Report on Summary Judgment Practice Across Districts with Variations in Local Rules

Purpose: The Advisory Committee on Civil Rules asked the Federal Judicial Center to examine summary judgment practice across federal district courts as a means of assessing the potential impact of the proposed amendments to Rule 56. Those proposed amendments will, among other things, require the movant to "state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law," and require the respondent to address each one of those facts in similarly numbered paragraphs. We compare summary judgment practice across three groups: (1) districts with local rules that place similar requirements on both the movant and respondent; (2) districts with local rules that place similar requirements only on the movant; and, (3) districts with no similar requirement in their local rules. We examine both the nature and outcome of individual summary judgment **motions** (Tables 1 through 5), and the **cases** in which the summary judgment motions are filed and resolved (Tables 6 through 12). Each table first reports the results for all cases in each of the three groups of districts, and then reports the results separately for five broad types of cases – contracts, torts, employment discrimination, other civil rights, and other remaining cases.

Summary of Findings: Our analyses found very few meaningful differences in summary judgment practice in districts that have local rules that require a structured format for the motion and response similar to the proposed rule.[1] (For purposes of this

[1] This report builds on a preliminary report submitted to the Advisory Committee on November 2, 2007 and includes data from an additional eight federal districts that could not be included in the preliminary report due to distinctive district coding practices. Two differences were of particular concern in the preliminary analysis -- districts with local rules that are similar to the proposed amendment required more time to resolve summary judgment motions and had a higher percentage of employment discrimination cases terminated by summary judgment. The difference in median weeks to disposition (Table 5) remains sizeable but may be explained by differences in other characteristics of the three groups of districts as

discussion we arbitrarily designate a meaningful difference as a difference that exceeds five percentage points between the districts with such local rules and either of the other two district groups. These differences are indicated in the tables in bold print. The Advisory Committee may determine that a greater or lesser difference constitutes a meaningful difference.)

Summary judgment motions are filed at approximately the same rate by plaintiffs and defendants across all three groups (Tables 6 through 9). In districts with the structured format for the movant and respondent, defendants are somewhat more likely to file a summary judgment motion in torts cases and somewhat less likely to file in civil rights cases (Tables 6 and 7), a difference that is difficult to interpret. We found no meaningful differences across the three groups of districts in the percentage of cases with summary judgment motions granted (Tables 10 and 11) and in the percentage of cases terminated by summary judgment (Table 12).

When we examine individual summary judgment motions rather than cases, it appears that motions are more likely to be resolved in districts that require a structured format for movants and respondents, with a tendency for more motions to be granted (Table 3). However, if we consider only those motions resolved, there is no meaningful differences across groups in the percentage of motions granted and denied (Table 4). More time is required to resolve motions in districts that require a structured format for the movant and respondent (see Table 5). However, a supplementary analysis indicated that the longer time to disposition in such districts may be related to characteristics of those districts unrelated to their summary judgment local rule. Such districts have higher median weighted caseloads, greater numbers of pending cases per judge, and require more time to reach a disposition in all cases, including cases that do not have motions for summary judgment (Appendix B).

Methodology: We sorted each federal district court into one of three groups based on the districts' local rules governing summary judgment, relying on the analysis of local rules by Jeffrey Barr and James Ishida to guide this classification.[2] The first group consisted of twenty federal districts that have local rules with summary judgment requirements similar to those of the proposed amendment. In general, local rules in these districts require the moving party to include a statement of undisputed facts with its motion for summary judgment, and require the non-moving party to respond to the movant's statement, fact-by-fact. We refer to these districts as having local rules that require a structured format for the movant and respondent. We assumed that summary judgment practice in these districts follows a pattern that will become common in other federal districts if the proposed amendments are adopted.

---

indicated in Appendix B. The difference in the percentage of employment discrimination cases terminated by summary judgment (Table 12) has dropped to less than five percentage points across the groups and does not meet our test for a meaningful difference.

[2] Memorandum to Judge Michael Baylson from Jeffrey Barr and James Ishida, Survey of District Court Local Summary Judgment Rules (March 21, 2007).

The second group consisted of thirty-four federal district courts with local rules that require the moving party to include a statement of undisputed facts, but do not require the respondent to address each fact. We refer to these districts as having local rules that require a structured format for the movant only. We believe that summary judgment practice in these districts may have some, but not all, of the characteristics of summary judgment practice under the proposed amendment.

The third group consisted of thirty-seven federal district courts that do not require the moving party to submit a statement of undisputed facts with its motion, either because these districts do not have a local rule governing summary judgment practice or because the districts' local rules do not address the manner in which the motion should be presented.[3] We refer to these districts as having local rules that do not specify the structure or response to a motion for summary judgment. We believe that summary judgment practice in this third group may be most affected by the proposed amendment. A list of the districts in each of the three groups is presented in Appendix A. Characteristics of the three groups of districts are presented in Appendix B.

We began by identifying summary judgment motions in the 276,120 civil cases terminated the federal district courts in Fiscal Year 2006. We used Case Management / Electronic Case Filing (CM/ECF) data to identify 62,938 summary judgment motions and related court orders. Where necessary, we recoded these orders to indicate the final action taken by the court. We then determined, for each case, the number and type of summary judgment motions, number of motions by plaintiffs and defendants, number of motions granted in whole or in part, number of motions denied, the number of motions in which the court took no action, whether the case was terminated by summary judgment, and the time required to resolve the motion.

We included in the analyses only cases originally filed in the specified district, cases removed to the district from state courts, and cases transferred to the district through a change of venue. We excluded cases designated as class actions (though we have learned from other research that the attorney designation of a class action is an imprecise indicator of such cases), cases consolidated in multidistrict litigation proceedings, cases reopened or remanded from the courts of appeals, and cases appealed from magistrate judges' rulings. We also excluded asbestos personal injury product liability cases, bankruptcy appeals and withdrawals (because summary judgment motions are not filed), social security cases (because summary judgment motions are the procedural device used to review the decision of the administrative law judge), and prisoner cases (because such cases are likely to be exempt from the proposed rule due to the pro se nature of the plaintiff). We also removed from the third group of districts those cases terminated by twenty-eight judges who, according to the district web site, routinely use a standing order that requires the parties to engage in the kinds of structured summary judgment motions and responses required by the proposed local rule. Finally, we were unable to obtain

[3] For this analysis we reclassified the Eastern District of Pennsylvania as a district with no summary judgment local rule, thereby correcting an earlier misclassification. James Ishida has examined our classification of other districts and confirmed that the districts are correctly classified.

useable CM/ECF data and local rule information from three districts -- Western District of Wisconsin, District of the Northern Marianas Islands, and District of the Virgin Islands -- and excluded these districts from the analyses. Data from all other federal districts were included in the analyses.

After these exclusions, we were left with 155,803 cases, or 56 percent of cases terminated in FY 2006. Of these cases, 23,725 contained at least one motion for summary judgment. In total, we analyzed 46,633 separate motions for summary judgment.

Commentary: In general, we found few differences in summary judgment practice across the three groups of districts. Most notably, we found no meaningful differences across the groups in the likelihood that cases are terminated by summary judgment (Table 12). Even where differences exist, it is difficult to determine if the differences are due to the local rule governing summary judgment practice or other characteristics shared by the district that have adopted such rules, as noted above. Districts with local rules requiring a structured format for the movant and respondent also have greater weighted case filings, more pending cases per judge, fewer case terminations per judge, and longer case disposition times. These district characteristics may have a greater effect on summary judgment practice than the structure of the local rule.

We also found that summary judgment motions are more likely to be decided in districts with a structured format for the movant and respondent. Perhaps the structured format leads to better motions; perhaps judges find such motions easier to resolve; or perhaps this too is related to district characteristics unrelated to the structure of the local rule.

As in previous research,[4] we found great variation in summary judgment practice across individual districts. Some of these differences are due to differences in types of cases filed in the districts, but there still exists great variation across districts in the same types of cases. Courts clearly vary in local culture and practice regarding summary judgment in ways that are not revealed by differences in local rules.

While we found few differences in employment discrimination cases related to the type of summary judgment local rule, the expansive role of summary judgment in such cases is striking. Across all three groups summary judgment motions by defendants are far more common in employment discrimination cases than in any other type of case (Table 7), are far more likely to be granted in whole or in part (Tables 10 and 11), and such cases are more likely to be terminated by summary judgment (Table 12). Perhaps summary judgment motions are more common in employment discrimination litigation due, in part, to the number of defendants who often are named and the frequent presence of collateral state claims. Summary judgment then is used as a procedure to narrow the issues on which the court must rule. Of course, this does not explain the higher rate of employment discrimination cases terminated by summary judgment.

---

[4] Joe S. Cecil, Rebecca N. Eyre, Dean Miletich, and David Rindskopf, A Quarter-Century of Summary Judgment Practice in Six Federal District Courts, 4 *Journal of Empirical Legal Studies,* 861–907 (2007).

Table 1: Party Moving for Summary Judgment

Motions in:		Local Rule Requires Structured Format by: Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
All Cases	Defendant	71%	72%	68%	32,779
	Plaintiff	26%	26%	23%	11,546
	No Moving Party	**3%**	2%	**9%**	2,304
Contracts	Defendant	56%	60%	57%	
	Plaintiff	**42%**	40%	**35%**	
	No Moving Party	**2%**	0%	**8%**	
Torts	Defendant	85%	85%	87%	
	Plaintiff	14%	14%	12%	
	No Moving Party	1%	1%	1%	
Employment Discrimination	Defendant	90%	90%	91%	
	Plaintiff	9%	9%	9%	
	No Moving Party	1%	1%	0%	
Other Civil Rights	Defendant	82%	82%	84%	
	Plaintiff	17%	17%	16%	
	No Moving Party	1%	2%	1%	
Other	Defendant	58%	59%	62%	
	Plaintiff	40%	39%	37%	
	No Moving Party	2%	3%	1%	

Table 2: Type of Summary Judgment Motion

		Local Rule Requires Structured Format by:			
		Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
Motions in:					
All Cases	Summary Judgment	**91%**	**85%**	89%	39,824
	Partial Summary Judgment	9%	14%	11%	5,198
	Rule 54 Motion	0%	1%	0%	220
Contracts	Summary Judgment	**87%**	**79%**	85%	
	Partial Summary Judgment	**12%**	**21%**	15%	
	Rule 54 Motion	1%	1%	1%	
Torts	Summary Judgment	**90%**	**84%**	87%	
	Partial Summary Judgment	**10%**	**16%**	13%	
	Rule 54 Motion	0%	1%	1%	
Employment Discrimination	Summary Judgment	96%	92%	95%	
	Partial Summary Judgment	4%	7%	5%	
	Rule 54 Motion	0%	0%	0%	
Other Civil Rights	Summary Judgment	94%	90%	92%	
	Partial Summary Judgment	6%	10%	8%	
	Rule 54 Motion	0%	0%	1%	
Other	Summary Judgment	88%	83%	88%	
	Partial Summary Judgment	11%	16%	12%	
	Rule 54 Motion	1%	1%	0%	

Table 3: Action on Summary Judgment Motion

		Local Rule Requires Structured Format by:			
		Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
Motion in:					
All Cases	Denied	17%	14%	15%	7,005
	Grant in Whole	**24%**	**18%**	**19%**	9,219
	Grant in Part	8%	5%	7%	2,963
	Adopt Mag R&R	0%	0%	0%	6
	Moot	2%	2%	2%	842
	No Disposition	**50%**	**62%**	**58%**	26,594
Contacts	Denied	17%	16%	18%	
	Grant in Whole	18%	14%	15%	
	Grant in Part	8%	5%	7%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	3%	1%	2%	
	No Disposition	**55%**	**64%**	59%	
Torts	Denied	17%	16%	17%	
	Grant in Whole	19%	18%	20%	
	Grant in Part	7%	4%	5%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	3%	2%	
	No Disposition	55%	60%	57%	
Employment Discrimination	Denied	14%	12%	12%	
	Grant in Whole	**37%**	**27%**	**25%**	
	Grant in Part	**9%**	8%	10%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	1%	1%	
	No Disposition	**39%**	**52%**	**53%**	
Other Civil Rights	Denied	**15%**	**9%**	13%	
	Grant in Whole	**27%**	**20%**	24%	
	Grant in Part	9%	6%	8%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	2%	1%	3%	
	No Disposition	**48%**	**65%**	51%	
Other	Denied	20%	16%	18%	
	Grant in Whole	**20%**	**14%**	20%	
	Grant in Part	**6%**	**5%**	6%	
	Adopt Mag R&R	0%	0%	0%	
	Moot	3%	2%	2%	
	No Disposition	**51%**	**64%**	54%	

Table 4: Outcome of Summary Judgment Motions Granted or Denied

		Local Rule Requires Structured Format by:			
		Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
Motions in:					
All Cases	Denied	35%	38%	37%	7,005
	Grant Whole or Part	65%	62%	63%	12,182
Contracts	Denied	41%	46%	45%	
	Grant Whole or Part	59%	54%	55%	
Torts	Denied	40%	43%	41%	
	Grant Whole or Part	60%	57%	59%	
Employment Discrimination	Denied	23%	26%	25%	
	Grant Whole or Part	77%	74%	75%	
Other Civil Rights	Denied	30%	26%	29%	
	Grant Whole or Part	70%	74%	71%	
Other	Denied	44%	45%	41%	
	Grant Whole or Part	56%	55%	59%	

Table 5: Median Weeks to Disposition for Motions Granted (Whole or Part) or Denied

	Local Rule Requires Structured Format by:			
	Movant & Respondent	Movant Only	Not in Local Rule	Total Motions
Motions in:				
All Cases	23	17	15	18,625
Contracts	22	16	14	
Torts	22	13	12	
Employment Discrimination	25	17	16	
Other Civil Rights	21	19	15	
Other	23	18	16	

Table 6: Cases with at least One Summary Judgment Motion Filed by Any Party

	Local Rule Requires Structured Format by:			Total Cases
	Movant & Respondent	Movant Only	Neither Party	
All Cases				
No Motions	85%	83%	86%	132,078
At Least One Motion Filed	16%	17%	14%	23,725
Types of Cases with at Least One Motion				
Contracts	15%	18%	19%	
Torts	**13%**	13%	**5%**	
Employment Discrim.	35%	35%	37%	
Other Civil Rights	**20%**	25%	**27%**	
Other	9%	12%	13%	

Table 7: Cases with at least One Summary Judgment Motion by Defendant

	Local Rule Requires Structured Format by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	87%	86%	88%	135,647
At Least One Motion	13%	14%	12%	20,156
Types of Cases with at Least one Motion by a Defendant				
Contracts	10%	13%	14%	
Torts	**12%**	11%	**5%**	
Employment Discrim.	35%	34%	37%	
Other Civil Rights	**19%**	23%	**25%**	
Other	7%	9%	10%	

Table 8: Cases with at least One Summary Judgment Motion by Plaintiff

	Local Rule Requires Structured Format by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	95%	94%	96%	147,887
At Least One Motion	5%	6%	4%	7,916
Types of Cases with at Least one Motion by a Plaintiff				
Contracts	9%	10%	11%	
Torts	2%	2%	1%	
Employment Discrim.	3%	4%	3%	
Other Civil Rights	4%	6%	5%	
Other	5%	7%	7%	

Table 9: Cases with at Least One Summary Judgment Motion by a Plaintiff and at least One Summary Judgment Motion by a Defendant

	Local Rule Requires Structured Format by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	97%	97%	98%	151,328
At Least One Motion	3%	3%	2%	4,475
Types of Cases with at Least one Motion by a Plaintiff and One by a Defendant				
Contracts	5%	5%	6%	
Torts	1%	1%	0%	
Employment Discrim.	3%	3%	3%	
Other Civil Rights	3%	4%	4%	
Other	3%	4%	4%	

Table 10: Cases with at least One Summary Judgment Motion Granted in Whole

	Local Rule Requires Structured Format by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	94%	95%	96%	148,253
At Least One Motion	6%	5%	4%	7,750
Types of Cases with at Least one Motion Granted in Whole				
Contracts	5%	5%	5%	
Torts	4%	3%	1%	
Employment Discrim.	16%	13%	12%	
Other Civil Rights	8%	8%	9%	
Other	3%	3%	4%	

Table 11: Cases with at Least One Summary Judgment Motion Granted in Whole or Part

	Local Rule Requires Structured Format by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
No Motions	93%	94%	95%	146,447
At Least One Motion	7%	6%	5%	9,356
Types of Cases with at Least one Motion Granted in Whole or Part				
Contracts	6%	6%	7%	
Torts	5%	4%	2%	
Employment Discrim.	20%	16%	16%	
Other Civil Rights	10%	10%	12%	
Other	4%	4%	5%	

Table 12: Cases Terminated by Summary Judgment

	Local Rule Requires Structured Format by:			
	Movant & Respondent	Movant Only	Neither Party	Total Cases
All Cases				
Not Terminated by Summary Judgment	96%	97%	97%	150,952
Terminated by Summary Judgment	4%	3%	3%	4,851
Types of Cases Terminated by Summary Judgment				
Contracts	3%	3%	3%	
Torts	2%	2%	1%	
Employment Discrim.	13%	10%	9%	
Other Civil Rights	5%	5%	6%	
Other	2%	2%	3%	

Note: Court records include no specific designation of cases terminated by a grant of a summary judgment motion. This designation was constructed for this table by identifying those cases that court records indicate were resolved through a dispositive motion before trial and included at least one summary judgment motion that was granted in whole.

Appendix A: Classification of Individual Districts*

Local Rule Requires Structured Motion and Response	Local Rule Requires Structured Motion by Movant Only	Local Rule does not Address format of Summary Judgment Motion
Arizona	Alabama - Southern	Alabama - Middle
California - Eastern	Arkansas - Eastern	Alabama - Northern
Connecticut	Arkansas - Western	Alaska
Georgia - Middle	California – Central	California - Northern
Georgia - Northern	District of Columbia	California – Southern
Illinois - Central	Florida - Northern	Colorado
Illinois - Northern	Florida - Southern	Delaware
Iowa - Northern	Georgia - Southern	Florida - Middle
Iowa - Southern	Hawaii	Guam
Maine	Idaho	Illinois - Southern
Nebraska	Indiana - Northern	Kentucky - Eastern
New York - Eastern	Indiana - Southern	Kentucky - Western
New York - Northern	Kansas	Maryland
New York - Southern	Louisiana - Eastern	Michigan – Eastern
Oregon	Louisiana - Middle	Michigan - Western
Pennsylvania - Middle	Louisiana - Western	Minnesota
Pennsylvania - Western	Massachusetts	Mississippi - Northern
Puerto Rico	Missouri - Eastern	Mississippi - Southern
South Dakota	Missouri - Western	North Carolina - Eastern
Tennessee - Middle	Montana	North Carolina - Western
	Nevada	North Dakota
	New Hampshire	Ohio – Northern
	New Jersey	Pennsylvania – Eastern
	New Mexico	Rhode Island
	New York - Western	South Carolina
	North Carolina - Middle	Tennessee - Eastern
	Oklahoma - Eastern	Tennessee - Western
	Oklahoma - Northern	Texas - Northern
	Oklahoma - Western	Texas - Southern
	Texas - Eastern	Texas - Western
	Utah	Virginia - Western
	Vermont	Washington - Eastern
	Virginia - Eastern	Washington - Western
	Wyoming	West Virginia - Northern
		West Virginia - Southern
		Wisconsin - Eastern

* The districts of the Virgin Islands, Wisconsin – Western, and Northern Marianas Island were excluded from the analyses due to missing data or missing information on local rules.

Appendix B: Median Characteristics of the Districts in Three Groups

Median Characteristics	Local Rule Requires Structured Format by: Movant & Respondent	Movant Only	Not in Local Rule
Weighted Case Filings per Judge	455	430	426
Pending Cases per Judge	404	375	371
Case Terminations per Judge	413	439	472
Months from Filing to Disposition	10	9	9
Percent Civil Cases over 3 yrs old	7	5	6

MEMORANDUM

DATE: April 1, 2008

TO: Judge Michael Baylson
Professor Edward Cooper
Judge Mark Kravitz
Judge Lee H. Rosenthal

FROM: Andrea Kuperman

SUBJECT: Use of "Deemed Admitted" Provisions in Local Summary Judgment Rules

---

This memorandum addresses research regarding proposed amendments to FED. R. CIV. P. 56(e), particularly with respect to the proposal to permit a court to deem facts uncontested where the nonmovant fails to respond to the motion for summary judgment or fails to respond in the proper format required by the rule. Specifically, the question has been raised as to whether deeming facts admitted could be considered to be inconsistent with the current summary judgment standard—*i.e.*, that a movant is entitled to summary judgment only if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. Many districts have implemented local rules that contain similar provisions to the proposed amendments to Rule 56, including provisions that permit courts to deem facts admitted. The Subcommittee requested that I research case law regarding how courts have implemented such rules with "deemed admitted" provisions and the reaction that the appellate courts have had to such local rules. In looking at the cases, I also examined whether the courts in districts that permit uncontested facts to be deemed admitted have automatically deemed facts admitted where the response was not in proper form or whether they

have required support for the facts before deeming them admitted.[1]

I. Courts Approving of Use of "Deemed Admitted" Practice

Most of the circuit court cases I reviewed approved of local rules that permit courts to deem facts admitted in the absence of a proper response to a motion for summary judgment.

The Supreme Court briefly addressed this issue in *Beard v. Banks*, 548 U.S. 521, 126 S. Ct. 2572 (2006). Although the issue before the Court was not directed to the propriety of a local summary judgment rule permitting the deemed admission of facts, the Court did note that such a rule had applied and did not express concern regarding such a rule. In *Beard*, a prisoner brought suit under the First Amendment against the Secretary of the Pennsylvania Department of Corrections, asserting that the Department had violated the rights of a certain group of inmates by restricting access to newspapers, magazines, and photographs. 126 S. Ct. at 2577. The Secretary moved for summary judgment, and filed a "Statement of Material Facts Not in Dispute," in accordance with Western District of Pennsylvania's local rule. *Id.* The applicable local rules provided that facts asserted in a statement of material facts submitted in support of a summary judgment motion are deemed admitted if not controverted by the opponent.[2] The plaintiff (who was represented by counsel) failed to respond to the Secretary's statement of facts, and instead filed his own crossmotion for summary judgment. *Id.* The plaintiff did not dispute any of the facts set forth by the Secretary's

---

[1] Because a search for cases addressing the deemed admitted standard in summary judgment turned up thousands of results, I have focused my research on a sampling of the more recent cases that have substantively addressed the practice of deeming facts admitted in summary judgment. I have also largely focused on appellate cases because I found that many of those often discussed both what was done at the district court level as well as what was done at the appellate level, and sometimes also discussed whether the implementation of local rules comported with the national summary judgment standard.

[2] The local rule at issue provides, in part: "Alleged material facts set forth in the moving party's Concise Statement of Material Facts or in the opposing party's Responsive Concise Statement, which are claimed to be undisputed, will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party." W.D. PENN. L.R. 56.1(E).

statement, and the Secretary argued that the plaintiff ought to be deemed to have admitted the Secretary's facts, based on the applicable local rule. The district court deemed the facts admitted and granted summary judgment. *Id.* This holding was reversed at the Third Circuit, which held that the prison's regulation could not be supported as a matter of law by the record in the case. *Id.* The Supreme Court reversed the Third Circuit, in a plurality opinion authored by Justice Breyer and joined by Chief Justice Roberts, Justice Kennedy, and Justice Souter,[3] finding that it was appropriate for the uncontroverted facts to have been deemed admitted. The Court noted: "The upshot is that, if we consider the Secretary's supporting materials, i.e., the statement [of material facts] and deposition, by themselves, they provide sufficient justification for the [prison's] Policy." *Id.* at 2580. The court focused on the fact that the plaintiff had not provided any fact-based or expert-based evidence to refute the summary judgment motion in the manner provided by the rules. *Beard,* 126 S. Ct. at 2580 (citing FED R. CIV. P. 56(e)). Instead, in the plaintiff's crossmotion for summary judgment, the plaintiff asserted that the Policy was "unreasonable as a matter of law." *Id.* at 2581. The Court held that the Third Circuit had "placed a high summary judgment evidentiary burden upon the Secretary, *i.e.*, the moving party," and that the Circuit court's conclusion offered "too little deference to the judgment of prison officials . . . ." *Id.* The Court concluded: "Here prison authorities responded adequately through their statement and deposition to the allegations in the complaint. And the plaintiff failed to point to "'specific facts'" in the record that could 'lead a rational trier of fact to find' in his favor." *Id.* at 2582 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (quoting FED. R. CIV. P. 56(e))).

---

[3] Justice Alito took no part in the decision, and Justice Thomas, joined by Justice Scalia, wrote a concurring opinion.

Justice Ginsburg wrote a dissenting opinion in *Beard*, noting that "[a]s the plurality recognizes, there is more to the summary judgment standard than the absence of any genuine issue of material fact; the moving party must also show that he is 'entitled to a judgment as a matter of law.'"[4] *Beard*, 126 S. Ct. at 2592 (Ginsburg, J., dissenting) (citing FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–55 (1986)). Justice Ginsburg continued: "Here, the Secretary cannot instantly prevail if, based on the facts so far shown and with due deference to the judgment of prison authorities, a rational trier could conclude that the challenged regulation is not 'reasonably related to legitimate penological interests.'" *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Justice Ginsburg noted that the Secretary's support for summary judgment was slim, and that the statement of undisputed facts contained a broad assertion that the regulation at issue served to "'encourage . . . progress and discourage backsliding.'" *Id.* Justice Ginsburg disagreed with the plurality that such statements were sufficient to show that the regulation was reasonably related to inmate rehabilitation, and stated that deference to the views of prison authorities "should come into play, pretrial, only after the facts shown are viewed in the light most favorable to the nonmoving party and all inferences are drawn in that party's favor." *Id.* at 2592–93 (citing *Liberty Lobby*, 477 U.S. at 252–55; *cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150–51 (2000)). Although not addressed in her dissenting opinion, Justice Ginsburg's view would seem consistent with the idea that even if a movant's facts are to be deemed admitted as a result of an improper response to a summary judgment motion, those facts could not be the basis for granting summary judgment without some showing in the record to support those facts.

---

[4] Justice Stevens wrote a separate dissenting opinion, joined by Justice Ginsburg, but that opinion focused on the Fourteenth and First Amendment issues, rather than the summary judgment standard.

A. Discretion to Enforce Local Rules

One key factor that appellate courts have expressed in reviewing district court opinions that deem facts admitted in the summary judgment context is the deference given to district courts' application of local rules. The appellate courts review those determinations only for an abuse of discretion and thus do not seem to have difficulty affirming a district court's decision to deem facts admitted in accordance with local rules. *See, e.g.*, *CMI Capital Market Inv., LLC v. Gonzalez-Toro*, No. 06-2623, 2008 WL 713577, at *3 (1st Cir. March 18, 2008) (where the nonmovants failed to submit a separate statement of material facts in accordance with the local rule, "[t]he district court was . . . within its discretion to deem the facts in the [movant's] statement of material facts admitted."); *Ríos-Jiménez v. Principi*, No. 06-2582, 2008 WL 651630, at *4 (1st Cir. March 12, 2008) ("In the event that a party opposing summary judgment fails to act in accordance with the rigors that such a [local summary judgment] rule imposes, a district court is free, in the exercise of its sound discretion, to accept the moving party's facts as stated.") (citations omitted); *John S. v. County of Orange*, No. 05-55021, 2007 WL 625249, at *1 (9th Cir. Feb. 26, 2007) (unpublished) ("It was not error for the district court to deem the material facts submitted by defendants as admitted and to grant summary judgment on procedural grounds.") (citing C.D. CAL. L.R. 56-3); *Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1033 (8th Cir. 2007) ("The district court was not obliged to scour the record looking for factual disputes. Therefore, the district court committed no abuse of discretion when it deemed admitted Adventure Lands's statements of undisputed facts where Libel's responses violated Local Rule 56.1."); *Kelvin Cryosystems, Inc. v. Lightnin*, No. 05-4880, 2007 WL 3193731, at *3 (3d Cir. Oct. 29, 2007) (unpublished) ("We have long recognized

that deemed admissions 'are sufficient to support orders of summary judgment.'")[5] (quoting *Anchorage Assocs. v. Virgin Islands Bd. of Tax Review*, 922 F.2d 168, 176 n.7 (3d Cir. 1990)); *Mariani-Colón v. Dep't of Homeland Sec.*, 511 F.3d 216, 219 (1st Cir. 2007) ("This court has previously held that submitting an 'alternate statement of facts,'rather than admitting, denying, or qualifying a defendant's assertions of fact 'paragraph by paragraph as required by Local Rule 56(c),' justifies the issuance of a 'deeming order,' which characterizes defendant's assertions of fact as uncontested.") (citing *Cabán Hernández v. Philip Morris USA, Inc.*, 486 F.3d 1, 7 (1st Cir. 2007)); *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 579 (8th Cir. 2006) ("District courts have broad discretion to set filing deadlines and enforce local rules," and "[w]ith Resonover failing to file a timely response [to the summary judgment motion], the district court did not abuse its discretion in deeming facts set forth in Officer Pruett's motion admitted.") (citing E.D. MO. L.R. 7-4.01(E)); *Hill v. Thalacker*, No. 06-1265, 2006 WL 3147274, at *2 (7th Cir. Nov. 1, 2006) (unpublished) ("[T]he district court acted within its discretion when it ignored Hill's proposed findings of fact and deemed Thalacker's facts admitted, given Hill's failure to follow the court's summary judgment procedures.")[6] (citing *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003)); *Mercado-Alicea v. P.R. Tourism Co.*, 396 F.3d 46, 50, 51 (1st Cir. 2005) (affirming the district court's decision to deem facts

---

[5] On appeal, the appellants did not contest the district court's treatment of the movant's statement of uncontested facts as admitted after the appellants had failed to submit a statement in response, but argued that the district court erred in refusing to consider the facts alleged by appellants. *Kelvin Cryosystems*, 2007 WL 3193731, at *3. The Third Circuit rejected that argument because the district court had stated that it considered the facts alleged in the appellant's opposition brief and "found the arguments relating to those facts 'unpersuasive.'" *Id.*

[6] The nonmovant was pro se, but the court found that "even pro se litigants must follow procedural rules of which they are aware, and district courts have discretion to enforce those rules against such litigants." *Hill*, 2006 WL 3147274, at *2 (citing *Metro Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002); *Greer v. Bd. of Educ. of Chicago*, 267 F.3d 723, 727 (7th Cir. 2001)). The court concluded that even if the district court had considered the affidavits submitted by the nonmovant in response to the summary judgment motion, "it would not have changed the ultimate outcome." *Id.*

admitted and noting that "'[d]istrict courts enjoy broad latitude in administering local rules,'" and "[d]istrict courts are not required to ferret through sloppy records in search of evidence supporting a party's case.") (citations omitted); *Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of this [local summary judgment] rule, noting repeatedly that 'parties ignore [it] at their peril' and that 'failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted.'")[7] (citing *Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000)); *Espinoza v. Northwestern Univ.*, No. 03-3251, 2004 WL 1662281, at *2 (7th Cir. July 20, 2004) (unpublished) (the district court did not abuse its discretion in deeming the movant's facts admitted and in granting summary judgment upon the nonmovant's failure to respond to a summary judgment motion without excuse) (citing *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 817 (7th Cir. 2004); *Dade v. Sherwin-Williams Co.*, 128 F.3d 1135, 1139–40 (7th Cir. 1997)); *Northwest Bank and Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 724–25 (8th Cir. 2003) (finding no abuse of discretion where the district court, "[a]s a sanction for noncompliance [with the local summary judgment rule], . . . ordered that Northwest be deemed to have admitted all of FINB's Statement of Material Facts," and limited its consideration of the nonmovant's "Statement of Additional Material Facts" to those that were specifically referenced by the nonmovant in its opposition brief to the extend they did not contradict the facts submitted by the movant.).

[7] The court noted that the District of Puerto Rico amended its local rules in September 2003, but since the lawsuit was brought before the amended rules' effective date, the case was analyzed under the pre-amended version. *Cosme-Rosado*, 360 F.3d at 44 n.4.

B. Approval of Local Rules Simplifying Summary Judgment Procedure

Some appellate courts have gone further than finding that the district court has discretion in applying local rules, and have also affirmatively commented on the value of local rules providing structured summary judgment procedures that permit courts to deem facts admitted as a sanction for noncompliance. For example, in *CMI Capital Market Inv., LLC v. Gonzalez-Toro*, No. 06-2623, 2008 WL 713577, at *3 (1st Cir. March 18, 2008), the appellants had submitted an opposition to a summary judgment motion, but did not include an opposing statement of material facts as required by the local rule.[8] 2008 WL 713577, at *2. In commenting on what it termed "the anti-ferret rule," the First Circuit stated that "[t]he purpose of this rule is to relieve the district court of any responsibility to ferret through the record to discern whether any material fact is genuinely in dispute." *Id.* The court explained that "[t]he deeming order is both a sanction for the parties and a balm for the district court: the parties are given an incentive to conform to the rule (provided they wish to have their version of the facts considered), and the district court is in any case relieved of the obligation to ferret through the record." *Id.* at *2 n.2. The court also noted that "[w]hen summary judgment is granted after a deeming order, [the First Circuit is] bound by the order as well, provided it was not an abuse of the district court's discretion." *Id.* at *3.

In *Ríos-Jiménez v. Principi*, 2008 WL 651630 (1st Cir. March 12, 2008), the First Circuit

---

[8] The local rule at issue, the District of Puerto Rico Local Rule 56(c), provided:

> A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule.

D.P.R. L.R. 56(c). The rule also provides: "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, *shall be deemed admitted unless properly controverted.*" *CMI Capital Market Inv., LLC*, 2008 WL 713577, at *2 (quoting D.P.R. L.R. 56(e)) (emphasis added by court).

again acknowledged the importance of local rules simplifying summary judgment:

> "Such rules were inaugurated in response to this court's abiding concern that without them, 'summary judgment practice could too easily become a game of cat-and-mouse.' *Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000). Such rules are designed to function as a means of 'focusing a district court's attention on what is—and what is not—genuinely controverted.' *Calvi v. Knox County*, 470 F.3d 422, 427 (1st Cir. 2006). When complied with, they serve 'to dispel the smokescreen behind which litigants with marginal or unwinnable cases often seek to hide [and] greatly reduce the possibility that the district court will fall victim to an abuse.' *Id.*
>
> Given the vital purpose that such rules serve, litigants ignore them at their peril. In the event that a party opposing summary judgment fails to act in accordance with the rigors that such a rule imposes, a district court is free, in the exercise of its sound discretion, to accept the moving party's facts as stated."

Ríos-Jiménez, 2008 WL 651630, at *4 (quoting *Cabán Hernández*, 486 F.3d at 7). The court in *Ríos-Jiménez* concluded that the local rule was "intended to prevent parties from shifting to the district court the burden of sifting through the inevitable mountain of information generated by discovery in search of relevant material." *Id.*; *see also Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 14–15 (1st Cir. 2004) (noting that the local rules such as the District of Puerto Rico's local rule regulating summary judgment practice have been adopted pursuant to the First Circuit's suggestion and that the First Circuit has consistently upheld the use of such rules).

Similarly, in *Northwest Bank and Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 724 (8th Cir. 2003), the Eighth Circuit approved of Local Rule 56.1 used in the Northern and Southern Districts of Iowa. That rule provides that the moving party must file a concise statement of material facts supported by citations to an appendix, and the opposing party must file a response to that statement that "'expressly admits, denies, or qualifies' each of the movant's material facts," and that cites to an appendix for any fact not expressly admitted. *Id.* (citing IOWA L.R. 56.1). The opponent

is also required to file its own statement of material facts with citations to an appendix. *Id.* (citing IOWA L.R. 56.1). The Eighth Circuit approved of the rule, stating "[t]he concision and specificity required by Local Rule 56.1 seek to aid the district court in passing upon a motion for summary judgment, reflecting the aphorism that it is the parties who know the case better than the judge." *Id.* at 725 (citing *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994)). The court further explained that "Local Rule 56.1 exists to prevent a district court from engaging in the proverbial search for a needle in the haystack." *Id.*

C. Necessity of Finding Support in the Record Before Deeming Facts Admitted

Several appellate courts have commented as to whether the facts to be deemed admitted must actually have support in the record in order for courts to rely on them in granting summary judgment. For example, in *Espinoza v. Northwestern Univ.*, No. 03-3251, 2004 WL 1662281, at *2 (7th Cir. July 20, 2004) (unpublished), the Seventh Circuit found no abuse of discretion in the district court's decision to deem facts admitted, noting that the movant's facts were "supported by the record, including affidavits . . . ," and that the nonmovant had not offered an excuse for failure to respond to the motion for summary judgment. While not an express statement that district courts must find support in the record before deeming facts admitted, *Espinoza*'s holding supports the proposition that it is more appropriate to deem facts admitted if there is support for those facts.

Similarly, in *Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004), the First Circuit affirmed the district court's decision to deem admitted "properly supported facts set forth in [the movant's] statement" of material facts. The district court had found that the nonmovants had "failed to provide a supported factual basis for their claims against Serrano . . . ." *Id.* at 44–45. After deeming the movant's facts admitted and properly-supported, the district court had found that there

was no genuine issue of material fact and granted summary judgment. *Id.* The appellate court affirmed, finding that "summary judgment rightly followed" the deemed admission of the movant's facts. *Id.* at 46. The First Circuit quoted *Tavarez v. Champion Prods., Inc.*, 903 F. Supp. 268, 270 (D.P.R. Nov. 1, 1995), for the proposition that "'[a]lthough [failure to comply with Local Rule 311.12] does not signify an automatic defeat, it launches the nonmovant's case down the road toward an easy dismissal.'" *Cosme-Rosado*, 360 F.3d at 46. Thus, the court seemed to indicate that the facts deemed admitted require support in the record and that the nonmovant's failure to comply does not result in an automatic grant of summary judgment, but also indicated that once the nonmovant fails to comply with the local rule, it is much easier for the movant to obtain summary judgment.

In *Mariani-Colón v. Dep't of Homeland Sec.*, 511 F.3d 216, 219, 219 n.1 (1st Cir. 2007), the First Circuit upheld the district court's decision to treat the movant's statement of facts as uncontested after the nonmovant failed to respond to the summary judgment in the manner required by the relevant local rule, but the court explained that a party is not necessarily entitled to summary judgment by having its facts admitted. The court stated: "'This, of course, does not mean the unopposed party wins on summary judgment; that party's uncontested facts and other evidentiary facts of record must still show that the party is entitled to summary judgment.'" *Mariani-Colón*, 511 F.3d at 219 n.1 (quoting *Torres-Rosado v. Rotger Sabat*, 335 F.3d 1, 4 (1st Cir. 2003)). While this explanation does not necessarily mean that the court is required to search for support for the uncontested facts before deeming them admitted, it does require the district court to ensure that the facts show entitlement to judgment before granting summary judgment. This requirement may prompt the district courts to examine whether the "uncontested facts" have support in the record.

The Eighth Circuit has also indicated that facts should not be deemed admitted without some

support in the record and that the nonmovant's failure to properly respond to a summary judgment motion does not automatically entitle the movant to judgment. In *Reasonover v. St. Louis County, Mo.*, 447 F.3d 569, 579 (8th Cir. 2006), the defendant failed to file a timely response to a summary judgment motion, as required by the federal rules and the Missouri local rule on summary judgment. The Eighth Circuit rejected an argument that the district court's order deeming the facts set forth in the motion for summary judgment admitted amounted to a default judgment. *Id.* The Eighth Circuit explained that "[t]he [district] court considered the admitted facts in light of the relevant law and ruled based on the merits." *Id.* (citing *Bennett v. Dr Pepper/Seven Up, Inc.*, 295 F.3d 805, 809 (8th Cir. 2002)). Based on the uncontroverted facts in the motion, the circuit court found that summary judgment had been appropriate. *Id.* As in *Mariani-Colón*, the *Reasonover* court did not specifically state that the district court was required to find the facts to be supported by the record before deeming them admitted. However, the fact that the court noted that the district court's decision to deem facts admitted did not amount to a default judgment because it had ruled on the merits after deeming facts admitted, may imply that there ought to be some support for the deemed admitted facts before a grant of summary judgment is based on such facts.

In *Magee v. Earl*, 122 F.3d 1056, 1995 WL 595547 (2d Cir. 1995) (unpublished), the Second Circuit concluded that deemed admission of facts had been appropriate under the local rules because the facts were both supported and uncontested. In that case, the defendants moved for summary judgment and submitted a statement of material facts as required under the local rule. *Id.* at *2. The Second Circuit explained that the local rule required that the moving party submit a statement of facts and that "[f]acts thus *asserted and supported* as required by FED. R. CIV. P. 56(e) are deemed admitted unless controverted by the party opposing summary judgment in a submission pursuant to

[Local] Rule 3(g)."[9] *Id.* at *1 (emphasis added). The district court granted summary judgment, and the Second Circuit affirmed because the defendants' asserted facts had been uncontested and were supported by references to the plaintiff's deposition, and were therefore properly deemed admitted. *See id.* at *2. After the deemed admission of the defendants' facts, there was no evidence on which a rational jury could find for the plaintiff and summary judgment was appropriate. *Id.*

In *Doe v. Todd County School Dist.*, No. 05-3043, 2006 WL 3025855, at *7–8 (D.S.D. Oct. 20, 2006), the court applied the local rule regarding deemed admission where both parties had failed to comply with the requirements of the rule, and ultimately determined that even when a motion is unopposed, it cannot be granted without sufficient support in the record. In that case, the plaintiff claimed that the defendants' statement of undisputed facts did not comply with the requirements of the local summary judgment rule, while the defendants argued that the plaintiff's response to their summary judgment motion failed to comply with both Fed. R. Civ. P. 56(e) and with the local rule because the plaintiff did not respond to the substance of the defendants' motion or include a statement of material facts.[10] *Doe*, 2006 WL 3025855, at *7. The court held that "[t]he failure to comply with a local rule requiring that a motion for summary judgment be accompanied by a concise

---

[9] Similar language was used in *Rand v. United States*, 818 F. Supp. 566, 571 (W.D.N.Y. 1993): "When a party has moved for summary judgment on the basis of asserted facts *supported as required by FED. R. CIV. P. 56(e)* and has . . . served a concise statement of the material facts as to which it contends there exist no genuine issues to be tried, those facts will be deemed admitted unless properly controverted by the nonmoving party." *Id.* at 571 (quoting *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2d Cir. 1992)) (emphasis added).

[10] The local rule at issue provided:

> [U]pon any motion for summary judgment . . . there shall be annexed to the motion a separate, short, and concise statement of material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this Local Rule's required statement shall be presented in a separate, numbered statement with an appropriate citation to the record in the case.

Doe, 2006 WL 3025855, at *7 (quoting D.S.D. L.R. 56.1(b)).

statement of material facts which the movant contends are not genuinely in dispute is a sufficient basis on which to deny a motion for summary judgment." *Id.* (citations omitted). However, the court explained that while "[t]he usual sanction for noncompliance with this [local] rule is the [other party's] facts being deemed admitted for purposes of the motion," the deemed admission "is not fatal since the standard of review for summary judgment requires the Court to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings and affidavits." *Id.* at *8. (citation omitted). The court stated that where the court reviews the entire record, the failure to comply with the local rules is "'of little consequence.'" *Id.* (quoting *Hansen v. Actuarial and Employee Ben. Servs. Co.*, 395 F. Supp. 2d 881, 884 n.2 (D.S.D. 2005)). The court concluded that "[u]nder either the sanction or the summary judgment standard the result is the same, the plaintiff's facts are deemed admitted for purposes of the motion. Thus, the material facts from the plaintiff's complaint will, for the purposes of this motion for partial summary judgment, be treated as undisputed." *Id.* However, because the plaintiff failed to submit a statement of material facts, the defendants' statement of material facts was to be deemed admitted. *Id.* "For the sake of the motion, the defendants' statement of facts is the plaintiff's complaint. This is the same set of facts the Court is compelled to employ by the summary judgment standard. Therefore, the facts stated in the plaintiff's complaint are deemed admitted for the purposes of this motion." *Doe*, 2006 WL 3025855, at *8. The court noted, however, that "'even when a defendant's motion for summary judgment is not opposed by plaintiff, the district court must satisfy itself that, on the record before it, there are no genuine issues of material fact as to at least one of [the] necessary elements of plaintiff's case.'" *Id.* (quoting *Noland v. Commerce Mortg. Corp.*, 122 F.3d 551, 553 (8th Cir. 1997)).

Some other courts have implied that relying on deemed admitted facts without searching for support for those facts in the record might be acceptable, but I did not find many cases supporting this proposition. For example, in *John S. v. County of Orange*, No. 05-55021, 2007 WL 625249, at *1 (9th Cir. Feb. 26, 2007) (unpublished),[11] the Ninth Circuit approved a grant of summary judgment where an inadequate opposition to the summary judgment motion was filed. The court found that the opponent's "untimely, unsworn, and conclusory 'supplemental statement' did not comply with the district court's explicit instructions or the local rules. C.D. CAL. L.R. 56-2. It was not error for the district court to deem the material facts submitted by defendants as admitted and *to grant summary judgment on procedural grounds*."[12] *John S.*, 2007 WL 625249, at *1 (emphasis added). The Ninth Circuit also noted that granting summary judgment on the merits was not erroneous. *Id.* The fact that the court had reviewed the merits makes it unclear whether summary judgment could have been granted based on deemed admitted facts without finding support in the record, but the court's approval of summary judgment on "procedural grounds" implies that facts could be deemed admitted without finding support for them in the record.

Given that courts have approved of local rules deeming facts admitted for the very reason that it avoids requiring the district court to search through a voluminous record to ensure that there is no

---

[11] The court did not publish its decision and it was labeled as not precedential. *John S.*, 2007 WL 625249, at fn.**.

[12] In another case using similar language, the magistrate judge recommended dismissal for failure to prosecute, but also found that "the plaintiff's failure to respond to the defendants' statements of material fact [submitted with defendants' summary judgment motion] constitutes an admission of each of those facts. *See* FED R. CIV. P. 56(e); LR 56.1(b)(4). Accordingly, the defendants are entitled to summary judgment *on procedural grounds*." *Stewart v. Kautzky*, No. C05-3030-MWB, 2006 WL 1594186, at *1 (N.D. Iowa June 6, 2006) (unreported) (emphasis added). The court also found that summary judgment would be appropriate in view of the claims, the facts in the complaint, the deemed admitted facts, exhibits and affidavits submitted in support of summary judgment, and statements from a motion for extension of time. *Id.* Thus, although the case noted that judgment on procedural grounds would be appropriate, it also found that the record supported judgment as a matter of law.

material issue of fact, it may follow that some courts would approve of deeming facts admitted in the absence of a proper response, without requiring the court to search for proper support for those facts. *See, e.g.*, *Ríos-Jiménez*, 2008 WL 651630, at *4 ("Should the Court excuse this blatant non-compliance [with the local summary judgment rule], the district court would be forced to 'grope unaided for factual needles in a documentary haystack.'") (quoting *Cabán Hernández*, 486 F.3d at 8). However, most courts seem to emphasize the importance of the summary judgment standard, finding that deemed admitted facts are not sufficient to support summary judgment without an evaluation of whether the standard has been met. This emphasis implies that it would be appropriate for the court to find support for the facts to be deemed admitted before relying on them for purposes of granting summary judgment.

D. Consideration of Additional Facts Presented by Nonmovant

Another issue that has been addressed by some courts considering the propriety of deeming facts admitted in summary judgment motions is whether a nonconforming response prevents consideration of additional facts submitted by nonmovant. For example, in *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 14–15 (1st Cir. 2004), the First Circuit considered whether the district court had erred in analyzing the defendant's summary judgment motion by restricting consideration of the plaintiff's evidence on the basis of the plaintiff's failure to comply with the local rules. *See Euromodas*, 368 F.3d at 15. The defendant's motion complied with the local rule, but the plaintiff's response omitted a separate statement listing the controverted material facts. *Id.* The district court found this to be a violation of the local summary judgment rule and both deemed the facts listed by the movant to be admitted and limited the summary judgment record to those facts. *Id.* (citing *Euromodas, Inc. v. Zanella, Ltd.*, 253 F. Supp. 2d 201, 203–04 (D.P.R. 2003)). The plaintiff did not

object to the district court deeming the defendant's facts admitted, but argued that the court should have taken the plaintiff's facts in its opposition into account as well. *Id.* The First Circuit agreed that the district court had erred in its interpretation of the local rule because the rule did not require the summary judgment motion's opponent to put forth its version of the facts in a separate statement. *Id.* A separate statement was required under the rule only if the nonmovant sought to controvert any of the facts listed in the movant's statement of facts. *Id.* The court explained that in this instance, the plaintiff did not take issue with the defendant's statement of facts, but believed they were incomplete and wished to submit additional facts. *Euromodas*, 368 F.3d at 15. The First Circuit stated that the local rule, as it existed at the time,[13] did not require additional facts to be presented in any particular form. *Id.* The First Circuit concluded that "[b]ecause those additional facts [submitted by the nonmovant] were supported by the record, the lower court should have considered them (while at the same time accepting the facts set forth in the movant's Local Rule 311.12 statement)." *Id.* at 15–16.

In *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 724 (8th Cir. 2003), after the defendant filed a summary judgment motion, the plaintiff filed an opposition that included both a "Response to Defendants' Statement of Material Facts," and a "Statement of Additional Material Facts Precluding Summary Judgment." The district court found that neither of the plaintiff's statements of material facts complied with the local rule requirements, and sanctioned the plaintiff by deeming admitted all of the facts in the defendant's statement and by limiting consideration of the plaintiff's statement of additional facts to only "those facts that were specifically referenced by [plaintiff] Northwest in its brief in opposition to summary judgment to the extent that

[13] The local rule had been amended since the filing of the summary judgment motion, and the First Circuit reserved its view as to what the new language required. *Euromodas*, 368 F.3d at 15 n.3.

they did not contradict those of [defendant] FINB." *Northwest Bank & Trust*, 354 F.3d at 724–25 (citing *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 221 F. Supp. 2d 1000, 1003–06 (S.D. Iowa 2002)). The court found that the district court's holding was not an abuse of discretion, and that the court had actually been lenient in considering the specific facts referenced in the plaintiff's brief. *Id.* at 725.

In *CMI Capital Mkt. Invest., LLC v. González-Toro*, No. 06-2623, 2008 WL 713577 (1st Cir. March 18, 2008), the court noted that it had previously held that "failure to set forth a paragraph-by-paragraph admission or denial of the movant's material facts justifies a deeming order even where the opposition does propound other facts." 2008 WL 713577, at *3 n.3 (citing *Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1, 7 (1st Cir. 2007)). The court continued, "*Hernandez* leaves open the possibility that facts marshaled in opposition might be accepted to 'augment' the facts contained in movant's statement of material facts, rather than contradict them." *Id.* (citing *Hernandez*, 486 F.3d at n.2). However, the court did not decide that issue, instead evaluating the record as though the facts had been accepted by the district court to augment the movant's facts, and finding that they did not change the result. *Id.* The First Circuit noted that although the opposition to the summary judgment contained some facts, they would only be considered to the extent that they did not contradict the facts deemed admitted by the district court, because the nonmovant failed to satisfy the "anti-ferret" rule. *Id.* at *5. The court stated that "the district court would likely have been free to disregard the facts in the opposition itself," but did not decide that question because the district court had not explicitly rejected or accepted those facts and because the facts made no difference to the outcome. *Id.* at *5 n.4.

The Seventh Circuit considered whether failure to properly cite supporting evidence in an

opposition to a summary judgment motion warrants both deeming the movant's facts admitted and ignoring the facts proposed by the nonmovant in *Hill v. Thalacker*, No. 06-1265, 2006 WL 3147274, at *2 (7th Cir. Nov. 1, 2006) (unpublished). In *Hill*, the district court's summary judgment rules required that each controverted or additional fact that a party proposed had to be accompanied by specific, supporting evidence. *Id.* at *1. In the plaintiff's response to the summary judgment motion, he attached supporting affidavits, but failed to refer to them specifically, instead "allud[ing] vaguely to unspecified 'attached' material." *Id.* The district court deemed the defendant's facts admitted because of the plaintiff's failure to comply with the summary judgment procedure, and granted summary judgment for the defendant. *Id.* at *2. The Seventh Circuit concluded that "the district court acted within its discretion *when it ignored Hill's proposed findings of fact* and deemed Thalacker's facts admitted, given Hill's failure to follow the court's summary judgment procedures." *Id.* (citing *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003); *Tatalovich v. City of Superior*, 904 F.2d 1135, 1140 (7th Cir. 1990)) (emphasis added) . Thus, in the context of an opposition submitting additional facts without following the procedure, the court concluded that those facts could be ignored by the district court.

II. Disapproval of Deeming Facts Admitted

A. Cases Finding Deemed Admission Inappropriate Under the Facts of the Case

Although many appellate courts have approved of the use of local rules to deem facts admitted in summary judgment, others have disapproved of the application of deeming facts admitted in certain circumstances.

For example, in *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 703 (7th Cir. 2006), the Seventh Circuit held that the district court had abused its discretion by deeming facts admitted under the

procedural posture of the case. In that case, the plaintiff had request additional time to take expert witness discovery and respond to a motion for summary judgment, which was granted by the court. *Deere*, 462 F.3d at 703. The defendant moved for an extension of the new expert witness discovery deadline, and the motion went undecided for several months. *Id.* As a result, the defendant's experts were not deposed and the plaintiff missed the deadline for responding to the defendant's summary judgment motion. *Id.* The court did not address the pending discovery dispute, but did find the plaintiff's failure to respond to the summary judgment motion to be an admission of the facts submitted in support of the defendants' summary judgment motion, and granted summary judgment for the defendant. *Id.* On appeal, the Seventh Circuit found this to be an abuse of discretion because although the plaintiff took the risk of having facts deemed admitted by failing to respond to summary judgment in the time permitted, "[t]he history of the motions practice in this case was such that the court should not have bypassed all the accumulated discovery motions to grant summary judgment on the basis of procedural default." *Id.* at 706–07.

In *Chidester v. Utah County*, No. 06-4255, 2008 WL 635361, at *10–11 (10th Cir. March 6, 2008) (unpublished), the Tenth Circuit also held that the circumstances at issue did not warrant the deemed admission of facts. In that case, the neighbors of a residence that was a target for a police raid sued police officers for violation of their Fourth Amendment rights. *Id.* at *1. The officers moved for summary judgment on the ground of qualified immunity, which the district court granted for some of the defendants but denied for two others. *Id.* On appeal, the appellant argued that District of Utah Local Rule 56-1(c) required the district court to accept as fact the appellant's version of the facts, and that summary judgment was required under those facts. *Chidester*, 2008 WL 635361, at * 10. The local rule at issue provided that "'[a]ll material facts of record meeting the

requirements of FED. R. CIV. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of FED. R. CIV. P. 56.'" *Id.* (quoting D. UTAH CIV. R. 56-1). The Tenth Circuit summarily rejected the argument that the local rule required summary judgment on qualified immunity grounds simply because the movant argued that the plaintiffs had not put forth any evidence to prove that the movant had "'manufactured the fact[s]'" giving rise to his qualified immunity claim. *Id.* at *11.

B. Concern Regarding the Practice of Deeming Facts Admitted

The research uncovered a few cases that have expressed concern regarding local rules that permit facts to be deemed admitted in the summary judgment context. In *DeRienzo v. Metro. Transport. Auth.*, No. 05-7021-cv, 2007 WL 1814277 (2d Cir. June 20, 2007) (unpublished), the plaintiff failed to follow the applicable local rule by failing to file a counterstatement to the defendants' statement of material facts. 2007 WL 1814277, at *1. The district court deemed the defendants' facts to be admitted and declined to consider additional facts presented by the plaintiff. *Id.* On appeal, the Second Circuit noted that "[t]he fact that Plaintiff failed to comply with Local Rule 56.1 'does not absolve the party seeking summary judgment of th[is] burden of showing that it is entitled to judgment as a matter of law, and a Local Rule 56.1 Statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.'" *Id.* (quoting *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003)). The court held that even assuming it had not been error to deem the facts from the Defendants' Rule 56.1 statement admitted and to consider only those facts on summary judgment, the district court had still erred in granting summary judgment under the facts. *Id.* at 645. The Second Circuit suggested that the district court on remand

ought to decide whether it would be proper to consider only the facts in the defendants' statement of facts, or "in an exercise of its discretion," to consider other facts in the record. *Id.* at 646. The court said that it "note[d] for future guidance that the district court erred in concluding that *Giannullo v. City of New York*, 322 F.3d 139 (2d Cir. 2003), overruled *Holtz* [*v. Rockefeller & Co.*, 258 F.3d 62 (2d Cir. 2001),] and established a new rule that the district court must deem the facts contained in a Rule 56.1 Statement admitted whenever the opposing party fails to contest them in a properly-filed Counterstatement. The panel in *Giannullo* was not empowered to overrule *Holtz's* holding that a district court had discretion to overlook a party's failure to comply with Local Rule 56.1, . . ., nor did it purport to do so." *Id.* at 646–47 (internal citations omitted). The court noted the potential for conflict between the local summary judgment rule and the national one: "[W]hile DeRienzo's submission failed to comply with Local Rule 56.1, it may have met the requirements of FED. R. CIV. P. 56. On remand, the district court should address whether a refusal to consider any of the facts proffered by DeRienzo would constitute an impermissible application of Local Rule 56.1, by putting the Local Rule in conflict with the Federal Rule." *Id.* at 647 (citing 28 U.S.C. § 2071(a)).

In *Mutual Fund Investors, Inc. v. Putnam Mgmt. Co.*, 553 F.2d 620 (9th Cir. 1977), the Ninth Circuit questioned whether a local summary judgment rule could conflict with the national summary judgment rule. In that case, after the movant had made a sufficient showing for summary judgment, the nonmovants did not file any opposing affidavits "'because the factual bases for the (appellants') opposition are amply set forth in the affidavits filed by (appellees) and by deposition testimony of (appellees[']) representatives.'" *Putnam*, 553 F.2d at 624. The local rule for the Central District of California at the time provided: "In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy

except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion." *Id.* at 625 (citing C.D. CAL. L.R. 3(g)(3)).[14] The court noted that Rule 56 of the federal rules (in effect at the time) "provides that a party opposing a summary judgment motion need not file contravening affidavits where the movants' own papers demonstrate the existence of a genuine issue of material fact." *Id.* (citing *Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976 (citing *Island Equipment Land Co. v. Guam Econ. Dev. Auth.*, 474 F.2d 753 (9th Cir. 1973); Advisory Note of 1963 to Subdiv. (e), Rule 56)). The court did not resolve whether there was a disparity between the local rule and the national rule because the district court had based its decision on an examination of the whole record, rather than deeming facts admitted. *Id.* The court stated: "we caution that it is highly questionable whether the district court can mandate the entry of summary judgment solely on the failure of the adverse party to file opposing papers 'where the movant's papers are themselves insufficient . . . or on their face reveal a genuine issue of material fact.'" *Id.* (quoting *Hamilton*, 539 F.2d at 686 n.1; *Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 n.10 (7th Cir. 1976) (Stevens, J.)).

III. Conclusion

In sum, the courts of appeals generally seem to grant broad discretion to district courts in applying local rules to streamline the summary judgment process. There has been quite a bit of emphasis on the need to avoid requiring the district court to scour the record to determine if there is a genuine issue of material fact. Courts of appeals have often approved of the sanction of deeming

---

[14] The current local rule that seems to have replaced this older version provides: "In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion." C.D. CAL. L.R. 56-3.

the opponent's facts admitted in the absence of a proper response in order to further that goal. Nonetheless, it appears that the courts do not often simply grant the movant's motion on the basis of an improper response. The cases often imply that the court has determined that the facts have some support in the record and that the movant is entitled to summary judgment before granting a motion based on facts that have been deemed admitted pursuant to a local rule.

MEMORANDUM

DATE: February 19, 2008

TO: Judge Mark Kravitz

FROM: Andrea Thomson

CC: Judge Lee H. Rosenthal
Judge Michael Baylson
Professor Edward Cooper

SUBJECT: Discretion to Deny Summary Judgment

This memorandum addresses research regarding FED. R. CIV. P. 56 and whether there is a circuit split regarding discretion to deny a motion for summary judgment when the movant meets the requisite standard in Rule 56.

A law review article from 2002 evaluated some of the case law on this issue. *See* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002). In the article, the authors state that "the notion of judicial discretion to deny an otherwise appropriate summary judgment motion has been evidenced in judicial opinion since the earliest decisions regarding summary judgment under the Federal Rules." *Id.* at 96. The article notes that federal courts are split over whether judges are required to grant summary judgment if it is technically appropriate. *Id.* at 104. According to the article, "[t]he majority of federal courts have held that judges have discretion to deny a motion for summary judgment, even if the parties' submissions would justify granting the motion. The First, Fourth, Fifth, Eighth, and Federal Circuits have each adopted this view. Moreover, various district courts in these and other circuits also have accepted this position." *Id.*

I. *Anderson v. Liberty Lobby, Inc.*

The confusion about the discretion to deny summary judgment may stem from a key Supreme Court case regarding summary judgment, in which the Court used conflicting language to describe the discretion given to trial court judges in considering motions for summary judgment. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In parts of the majority's opinion, the Court implied that there is little or no discretion to deny a motion for summary judgment if the movant has met his burden. For example, the Court stated that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248 (citing 10A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, pp. 93–95 (1983)). This language implies that a district court may not deny a properly supported summary judgment motion unless the court finds a material factual dispute. The Court also noted that "Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)) (additional internal quotation marks omitted). Further, the Court found that after the opponent to a motion for summary judgment sets forth facts showing that there is a genuine issue for trial, "the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." *Id.* at 250. The Court analogized to a motion for directed verdict in the criminal context, noting with approval that it has been held that upon a motion for directed verdict of acquittal, if the judge "'concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to

state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted.'" *Id.* at 253 (quoting *Curley v. United States*, 160 F.2d 229, 232–33 (D.C. Cir. 1947)). All of this language taken together seems to imply that a district court does not have discretion to deny a motion for summary judgment if the requisite standard is met—the judge must grant the motion upon the proper showing by the movant.[1]

However, the *Anderson* Court later suggested just the opposite: "Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Id.* at 255 (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948)). Indeed, *Anderson* has been cited both for the proposition that district courts have discretion to deny summary judgment, *see, e.g.*, *United States v. Certain Real Estate and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991), as well as for the proposition that they do not, *see Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), *aff'd on other grounds*, 515 U.S. 304 (1995). Thus, there is language in some cases showing potential disagreement as to whether there is discretion to deny a well-supported motion for summary judgment. The arguably conflicting language regarding discretion to deny summary judgment is discussed in more detail below. Overall, it may be that the circuits are generally in agreement that

---

[1] The language implying a lack of discretion to deny a motion for summary judgment is consistent with statements made by the Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), decided the same day as *Anderson*. *See* Friedenthal et al., 31 HOFSTRA L. REV. at 101–02. In *Celotex*, the Court stated: "'[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* at 102 (quoting *Celotex*, 477 U.S. at 322). In Friedenthal's article, the authors note that after *Celotex*, "[t]he Court's apparent position limiting judicial discretion would thus seem crystal clear were it not for another case in the trilogy, *Anderson v. Liberty Lobby Inc.*, decided on the same day as *Celotex*, that included language completely contrary to that quoted above." *Id.*

a court should grant a summary judgment motion if the movant has met his burden, but that there are some rare instances in which it would be appropriate for the court to deny even a well-supported motion.

II. Cases Recognizing Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Most of the circuits examining this issue have concluded that there is discretion to deny summary judgment.[2] *See, e.g.*, *NMT Med., Inc. v. Cardia, Inc.*, No. 2006-1645, 2007 WL 1655232, at *6 (Fed. Cir. June 6, 2007) (unpublished) ("This court defers to the district court's denial of summary judgment.") (citing *SunTiger, Inc. v. Sci. Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999)); *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285–86 (11th Cir. 2001) (holding that denial of a motion for summary judgment is not reviewable after a trial on the merits, and noting that the Supreme Court has held that "'even in the absence of a factual dispute, a district court has the power to 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.'"') (quoting *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994) (quoting *Anderson*, 447 U.S. at 255), and citing *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292 (11th Cir. 1991)); *Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995) (per curiam) (affirming the district court's opinion, which stated: "even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'a better course would be to proceed to a full trial.'") (quoting *Anderson*, 477 U.S. at

[2] Many of the circuits have issued opinions that state in their boilerplate language regarding the legal standards for analyzing summary judgment motions that the motion must be granted upon the proper showing. However, in cases where the discretion issue truly arises and is substantively evaluated, such as where a circuit court is reviewing a district court's denial of a summary judgment motion, most circuits have leaned towards finding that there is discretion to deny.

255–56); *United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991) ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing. Trial courts may 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.' A trial court's discretion to *deny* summary judgment is reviewed only for an abuse of discretion.") (internal citations omitted); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989) (finding no error in refusal to grant a motion for summary judgment because "[a] district judge has discretion to deny a Rule 56 motion even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.") (citing *Marcus v. St. Paul Fire and Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981); C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2728 (1983)); *Franklin v. Lockhart*, 769 F.2d 509, 510 (8th Cir. 1985) ("This Court has previously noted that even if the district court 'is convinced that the moving party is entitled to [summary] judgment the exercise of sound discretion may dictate that the motion should be *denied*, and the case fully developed.'") (quoting *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir. 1984) ("Even where summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it. We think this is such a case . . . .") (citing 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2728 (1983)); *Marcus v. St. Paul Fire and Marine Ins. Co.*, 651 F.2d 379, 382 (5th Cir. 1981) ("Even if St. Paul were entitled to summary judgment, the sound exercise of judicial discretion dictates that the motion should be denied to give the parties an opportunity to fully develop the case. This is particularly true in light of the posture

of the entire litigation. A district court can perform this 'negative discretionary function' and deny a Rule 56 motion that may be justifiable under the rule, if policy considerations counsel caution.") (citing *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979), *after remand*, 637 F.2d 1159 (8th Cir. 1980)); *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979) ("The court has no discretion to Grant a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment the exercise of sound judicial discretion may dictate that the motion should be Denied, and the case fully developed.").

In addition, several circuit courts have explained that an order denying a motion for summary judgment is reviewed only for abuse of discretion, implying approval of the proposition that a district court has discretion to deny a motion for summary judgment. *See SunTiger, Inc. v. Sci. Research Funding Group*, 189 F.3d 1327, 1333 (Fed. Cir. 1999); *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995) ("This court reviews a district court's decision to *deny* a motion for summary judgment for an abuse of discretion.") (citing *Southward v. S. Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 492 (6th Cir. 1993); *Pinney Dock & Trans. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988)). In *SunTiger*, the court rejected the argument that the district court had erred by denying summary judgment of patent invalidity, explaining:

> When a district court *grants* summary judgment, we review without deference to the trial court whether there are disputed material facts, and we review independently whether the prevailing party is entitled to judgment as a matter of law. By contrast, when a district court *denies* summary judgment, we review that decision with considerable deference to the court.

SunTiger, 189 F.3d at 1333 (internal citations omitted) (emphasis in original). The court continued:

> "The trial court has the right to exercise its discretion to deny a motion for summary judgment, even if it determines that a party is entitled to it if in the court's opinion, the case would benefit from a

> full hearing. The court can perform this 'negative discretionary function' and deny summary judgment if policy considerations so warrant; absent a finding of abuse, the court's discretion will not be disturbed."

Id. (quoting 12 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 56.41[3][d] (3d ed. 1999)). The court also held that "[t]o disturb the decision by the trial court, we would have to find that the facts were so clear that the denial of summary judgment was an unquestioned abuse of discretion." *Id.* at 1334. Judge Lourie dissented in *SunTiger*, noting that "[t]he rule of deference [to the trial court's denial of summary judgment] is a good one, soundly based. However, the rule is not absolute." *Id.* at 1337 (Lourie, J., dissenting). Judge Lourie thought the patent at issue should have been held invalid in light of the fact that validity is a question of law for the court and that the facts were clear that denial of summary judgment was an abuse of discretion. *Id.* at 1337–38.

Thus, at least the Fourth, Fifth, Sixth, Eighth, Eleventh, and Federal Circuits have recognized the discretion to deny a motion for summary judgment by expressing approval of discretionary denials or by expressing that denials should be reviewed only for an abuse of discretion. The First Circuit has also commented that "in some relatively rare instances in which Rule 56 motions might technically be granted, the district courts occasionally exercise a negative discretion in order to permit a potentially deserving case to be more fully developed." *Buenrostro v. Collazo*, 973 F.2d 39, 42 n.2 (1st Cir. 1992). The *Buenrostro* court held that generally "[d]istrict court orders granting or denying brevis disposition are subject to plenary review," but reserved its opinion on whether the use of negative discretion could work in qualified immunity cases, and on what the proper standard of review might be. *Id.* at 42, 42 n.2.

B. District Court Opinions

District courts have also explained that they have discretion to deny motions for summary judgment even if the standard in Rule 56 is met. For example, in *Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933 (S.D.N.Y. 1983), the court stated:

> Were this [claim of price discrimination] the only claim before the Court, we would undoubtedly grant summary judgment. However, in this case, in which the other antitrust claims are to go forward and the discovery required to develop them is virtually the same as that which would be required to develop the price discrimination claim, granting summary judgment at this point would serve no purpose. Such a disposition would save the defendants no costs in time, effort, or money and would deprive the plaintiff of whatever opportunity it may otherwise have to build a foundation under the claim, which has at least been adequately pled. Since the facts are exclusively in the possession of the moving party and discovery has barely begun, it appears desirable for the Court to exercise its discretion and deny the motion with leave to renew when discovery is complete.

Martin Ice Cream, 554 F. Supp. at 944 (citing *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2d Cir. 1968); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2728, at 557 & n.56 (1973 and Supp. 1982)). Likewise, the Eastern District of Pennsylvania has described the discretion to deny summary judgment motions:

> Despite this seemingly compulsory language [of Fed. R. Civ. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is "reason to believe that the better course would be to proceed to full trial." This discretion remains "even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial." Moreover, although the Third Circuit has not ruled on this question, most other Courts of Appeals have refused to review denials of summary judgment, finding that a district court judgment after a full trial on the merits supersedes earlier summary judgment proceedings.

Payne v. Equicredit Corp. of Am., No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) (internal citations omitted), *aff'd on other grounds*, Nos. 02-2706, 02-2771, 2003 WL 21783757 (3d Cir. Aug. 4, 2003) (per curiam) (unpublished); *see also Lyons v. Bilco Co.*, No. 3:01CV1106(RNC), 2003 WL 22682333, at *1 (D. Conn. Sept. 30, 2003) ("Judicial discretion to deny summary judgment in favor of a full trial has been approved by most courts of appeals.") (citing Friedenthal et al., *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFTRA L. REV. at 104; Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982 (2003)).

Other district courts in various circuits have described their discretion to deny summary judgment in certain circumstances. *See, e.g.*, *Lister v. Prison Health Servs., Inc.*, No. 8:04-cv-2663-T-26MAP, 2007 WL 624284, at *2 (M.D. Fla. Feb. 23, 2007) (denying summary judgment because of lack of clarity regarding material factual disputes, and noting that the court was exercising "its discretion to deny summary judgment, *even assuming the absence of a factual dispute . . . .*") (emphasis added); *Taylor v. Truman Med. Ctr.*, No. 03-00001-CV-W-HFS, 2006 WL 2796389, at *3 (W.D. Mo. Sept. 25, 2006) (denying a motion for summary judgment with respect to a claim for which the court "would not be comfortable in ringing down the curtain . . .," and for which the court found the exercise of its "negative discretion" to deny summary judgment when the record is inconclusive to be appropriate) (citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979)); *Propps v. 9008 Group, Inc.*, No. 03-71166, 2006 WL 2124242, at *1 (E.D. Mich. July 27, 2006) (holding that in light of the voluminous record and the complexity of the proposed facts, the effort necessary to determine whether genuine issues of fact existed was "not a productive use of [the

court's] time," that even if the movants had carried their burden, the court doubted the wisdom of terminating the case prior to trial, and that a court has discretion to deny a motion for summary judgment); *Lyons*, 2003 WL 22682333, at *1 ("Because summary judgment has this effect [of cutting off a party's right to present his case to the jury], trial courts must act with caution in granting it and may deny it in the exercise of their discretion when 'there is reason to believe that the better course would be to proceed to a full trial.'")[3] (quoting *Anderson*, 477 U.S. at 255); *United States v. T.J. Manalo, Inc.*, 240 F. Supp. 2d 1255, 1261 (Ct. Int'l Trade 2002) (declining to grant summary judgment despite the fact that there was no dispute as to any material fact because it was not clear that the Government was entitled to judgment as a matter of law and because "even where a movant has met its burden, a court retains the discretion to deny summary judgment notwithstanding the seemingly mandatory language of Rule 56(c) . . . . Rule 56 is thus 'far less mandatory' than the language of the rule would indicate."[4]; *New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 219 (N.D.N.Y. 2002) (denying summary judgment on certain claims because of the poor factual record and the necessity of difficult scientific evidence on the CERCLA claim, and noting that the exercise of discretion to deny was appropriate) (citing *Anderson*, 477 U.S. at 255–56); *Butler v. CMC Miss., Inc.*, No. CIV.A. 1:96CV349-D-D, 1998 WL 173233, at *7 (N.D. Miss. March 18, 1998) (denying summary judgment because a fact issue existed, but noting that the court "has the discretion to deny motions for summary judgment and allow parties to proceed to trial and more fully develop the

---

[3] The court also noted that in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–57 (1948), the Supreme Court had "recognized that summary judgment may not be the most appropriate way to resolve complex matters, even if the motion for summary judgment technically satisfies the requirements of Rule 56." Lyons, 2003 WL 22682333, at *1 n.1.

[4] The court also noted that "'[t]here is long-established doctrine holding that a court may deny summary judgment if it believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or where further development of the facts may enhance the court's legal analysis.'" *T.J. Manalo, Inc.*, 240 F. Supp. 2d at 1261 (quoting 11 MOORE'S FEDERAL PRACTICE § 56.32[6]).

record for the trier of fact") (citing *Kunin v. Feofanov*, 69 F.3d 59, 61 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989)); *Morris v. VCW, Inc.*, No. 95-0737-CV-W-3-6, 1996 WL 429014, at *1 (W.D. Mo. July 24, 1996) (denying summary judgment because of "necessarily limited consideration and the need for a quick ruling," noting that "[c]aution is the rule of judicial practice in . . . cases [seeking summary judgment late in the case]" and that "there is a 'negative discretion' to deny summary judgment even when 'technically' justifiable, when the ends of justice appear to favor full development of the facts at trial, in order that a fact-finder may acquire a sound 'feel' for the issues.") (citing *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *Caine v. Duke Commc'ns Int'l*, No. CV-95-0792 JMI (MCX), 1995 WL 608523 (C.D. Cal. Oct. 3, 1995) (granting a motion for summary judgment, but stating in boilerplate language that "[t]here is no absolute right to a summary judgment in any case. The court has discretion to deny summary judgment wherever it determines that justice and fairness require a trial on the merits.") (citing *Anderson*, 477 U.S. at 249–55); *McDarren v. Marvel Entm't Group, Inc.*, No. 94 CV. 0910 (LMM), 1995 WL 214482, at *5 (S.D.N.Y. April 11, 1995) (denying a motion for summary judgment on a breach of contract claim on the basis that an interpretation of the "best efforts" contract clause in light of circumstances had to be made by the fact finder, but also noting that "[w]here an issue is closely intertwined with an issue to be tried, a court has discretion to deny summary judgment even if the issue is 'ripe' for summary judgment.") (citing *Citibank v. Real Coffee Trade Co.*, 566 F. Supp. 1158, 1165 (S.D.N.Y. 1983); *Berman v. Royal Knitting Mills, Inc.*, 86 F.R.D. 124, 126 (S.D.N.Y. 1980)); *Wilson v. Studebaker-Worthington, Inc.*, 699 F. Supp. 711, 718–19 (S.D. Ind. 1987) (denying summary judgment and stating, "It has been repeatedly held that

despite all that may be shown, the Court always has the power to deny summary judgment if, in its sound judgment, it believes for any reason that the fair and just course is to proceed to trial rather than to resolve the case on a motion. Thus, an appraisal of the legal issues may lead the Court to exercise its discretion and deny summary judgment motions in order to obtain the fuller factual foundation afforded by a plenary trial.")[5] (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Flores v. Kelley*, 61 F.R.D. 442 (D. Ind. 1973); *Western Chain Co. v. Am. Mut. Liab. Ins. Co.*, 527 F.2d 986 (7th Cir. 1975)).

III. Cases Limiting Discretion to Deny Motions for Summary Judgment

A. Circuit Court Opinions

Despite the existence of the circuit opinions clearly stating that there is discretion to deny a motion for summary judgment, other circuit opinions have consistently repeated language that implies that there is little or no discretion to deny. *See, e.g.*, *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("A motion for summary judgment *must be granted* when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'") (quoting FED. R. CIV. P. 56(c)) (emphasis added); *Rease v. Harvey*, No. 06-15030, 2007 WL 1841080, at *1 (11th Cir. June 28, 2007) (unpublished) (same); *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 994 (6th Cir. 2007) (same); *Guilbert v.*

---

[5] The *Wilson* court's description of discretion to deny is seemingly at odds with a later Seventh Circuit opinion in *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam), where the Seventh Circuit held that "[s]ummary judgment is not a discretionary remedy." While the *Wilson* case has not been expressly overturned, the subsequent decision in *Jones* may call *Wilson*'s language regarding discretion to deny summary judgment motions into question. However, it is also possible that the holding in *Jones* was not as broad as it may seem. The appellate court in *Jones* reviewed the denial of the summary judgment motion on an interlocutory appeal regarding the defense of qualified immunity. The Seventh Circuit commented that immunity claims ought to be resolved as early in the case as possible, *id.*, and it may be that the reason for the court's statement regarding lack of discretion was that the appeal related to a defense that needed to be immediately resolved.

Gardner, 480 F.3d 140, 145 (2d Cir. 2007) (same); *Loggins v. Nortel Networks, Inc.*, No. 06-10361, 2006 WL 3153471, at *1 (5th Cir. Nov. 2, 2006) (unpublished) (same); *Mambo v. Vehar*, No. 05-2356, 2006 WL 1720211, at *1 (10th Cir. June 23, 2006) (unpublished) ("The familiar standard *requires that summary judgment be granted* . . ." if the Rule 56(c) standard is met.) (emphasis added); *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, 418 F.3d 1326, 1335 (Fed. Cir. 2005) ("Summary judgment *must be granted* . . ." if the Rule 56(c) standard is met) (emphasis added); *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir. 2000) ("[S]ummary judgment *is to be entered* if the evidence is such that a reasonable fact finder could find only for the moving party.")[6] (citing *Anderson*, 477 U.S. at 248; *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1389 (3d Cir. 1994)) (emphasis added); *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) ("Summary judgment *is not a discretionary remedy*. If the plaintiff lacks enough evidence, *summary judgment must be granted*.") (citing *Anderson*, 477 U.S. at 249–51; *Celotex*, 477 U.S. 317) (emphasis added), *aff'd on other grounds*, 515 U.S. 304 (1995); *Real Estate Fin. v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam) ("A district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law.") (citing *Celotex*, 477 U.S. at 322).

In sum, at least the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits have issued opinions that contain language seeming to mandate the entry of summary judgment if the movant shows that he is entitled to judgment. However, most of the cases containing this language have the language in the boilerplate section reciting the legal standard for review of

---

[6] The court also noted that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear th burden of proof at trial' *mandates the entry of summary judgment*." *Watson*, 235 F.3d at 857–58 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)) (emphasis added).

summary judgment orders. Very few of the cases with this language appear to actually apply the standard to an order denying summary judgment.[7] Of the cases cited in the previous paragraph, for example, only one of them definitively applied the rule that motions must be granted if the Rule 56(c) standard is met. *See Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) (finding that the district court was mistaken in determining that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim should also be tried"), *aff'd on other grounds*, 515 U.S. 304 (1995). The remainder of the cases cited in the previous paragraph involved review of a grant of summary judgment, and thus the courts did not have occasion to apply the standard used for review of a denial of summary judgment, despite discussion of that standard in the "legal standards" portion of the opinions.

B. District Court Opinions

Various district court cases also contain statements that summary judgment is mandatory if the movant has shown entitlement to summary judgment. *See, e.g.*, *Starns v. Health Prof'ls, Ltd.*, No. 04-1143, 2008 WL 268590, at *1 (C.D. Ill. Jan. 29, 2008) ("'Summary [judgment] is not a discretionary remedy. If the plaintiff lacks enough evidence, summary [judgment] must be granted.'") (quoting *Jones*, 26 F.3d at 728)[8]; *Levine v. Children's Museum of Indianapolis, Inc.*, No. IP00-0715-C-H/G, 2002 WL 1800254, at *1 (S.D. Ind. July 1, 2002) (granting summary judgment

---

[7] Finding appellate cases actually disapproving of a discretionary denial has proven to be difficult, perhaps because denials of summary judgment are rarely appealable. Most of the appellate cases substantively reviewing a denial of summary judgment have concluded that discretion to deny exists.

[8] A Westlaw search reveals that the *Jones* case has been cited in other cases 113 times for the proposition that summary judgment is not a discretionary remedy. All of these citations have been by district courts within the Seventh Circuit. I have surveyed a selection of these cases, and they appear to generally use this language as boilerplate language in the legal standards section of the opinion. Within the sampling of cases I reviewed, I did not see any cases where the district court expressed a desire to deny the motion but felt compelled to grant it in view of a standard that granting summary judgment is mandatory if the movant has shown entitlement.

where the plaintiff had failed to come forward with sufficient evidence, and stating in the section describing the legal standards that "[s]ummary judgment is not discretionary; if a party shows it is entitled to summary judgment, judgment must be granted.") (citing *Jones*, 26 F.3d at 728), *aff'd*, No. 02-3013, 2003 WL 1545156 (7th Cir. March 24, 2003) (unpublished); *In re Lawrence W. Inlow Accident Litig.*, No. IP 99-0830-C H/K, 2002 WL 970403, at *3 (S.D. Ind. April 16, 2002) ("Summary judgment is not a discretionary remedy. If a party shows it is entitled to summary judgment, the court must grant it.") (citing *Tangwall v. Stuckey*, 135 F.3d 510, 514 (7th Cir. 1998)), *aff'd sub nom. First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682 (7th Cir. 2004); *Gates v. L.R. Green Co.*, No. IP 00-1239-C H/G, 2002 WL 826394, at *1 (S.D. Ind. Mar. 20, 2002) ("Summary judgment is not a discretionary procedure, though. When the moving party has shown it is entitled to summary judgment, the court must grant it. To do otherwise would be to condemn the parties, witnesses, and jurors to spend time, money, and energy on a trial that could have only one just result."); *Acceptance Assoc. of Am., Inc. v. Various Underwriters of Lloyds of London*, CIV. A. No. 88-6816, 1989 WL 25146, at *2 (E.D. Pa. Mar. 16, 1989) (granting summary judgment after finding no genuine issue of material fact and citing 18A COUCH ON INS. 2d § 77:16 (Rev'd ed. 1983) for the proposition that "when undisputed documents show that the insurer is entitled to summary judgment, the court must grant the motion regardless of other facts in the record that may be in dispute."), *aff'd*, 884 F.2d 1382 (3d Cir. 1989); *Martinez v. Ribicoff*, 200 F. Supp. 191, 192 (D.P.R. 1961) ("It, therefore, follows that there is no genuine issue as to any material fact and that defendant's motion for summary judgment must be granted, defendant being entitled to judgment as a matter of law.").

Most of the district court cases I reviewed that state that summary judgment must be entered if the movant is entitled state this standard in the "legal standards" section of the opinion, and it is not clear if the court ultimately granted the summary judgment because it had no choice if the movant met its burden or because the court felt no need to exercise discretion to deny the motion under the facts of the case.[9] The *Acceptance Assoc. of Am.* and *Martinez* cases use the mandatory language within the analysis portion of the opinions, as opposed to in a separate section describing legal standards, but even in those cases, it is not clear whether the court felt compelled to grant summary judgment simply because it was mandatory if the movant met its burden or if the court granted the summary judgment because it viewed granting as the best option after the movant had met its burden.

C. Letter Asserting Lack of Discretion to Deny Summary Judgment

A January 10, 2008 letter from Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform ("the Letter") insists that the current standard is that summary judgment is mandatory when a litigant has met the burden of demonstrating the absence of a genuine issue of material fact. However, most of the cases cited in the Letter for this proposition do not actually evaluate the denial of a motion for summary judgment, making any boilerplate language that summary judgment is required less persuasive than the Letter indicates. The Seventh Circuit *Jones* case cited in the letter may be an anomaly with its strict language stating that "[s]ummary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted." *Jones*, 26 F.3d

---

[9] A search in Westlaw for cases stating that summary judgment is mandatory or must be granted if the standard is met turns up many cases. However, a review of a sampling of these cases reveals that few of them actually apply the proposition that summary judgment is mandatory if the standard is met, and merely contain language to that effect in the "legal standards" portion of the opinion. Finding district court cases granting summary judgment based on an alleged lack of discretion to deny once the standard is met has proven difficult, possibly because courts may not express a desire to deny the motion at the same time the court is granting the motion.

at 728. Notably, the *Jones* court emphasized that the issue on summary judgment involved a defense of immunity, stating that "[i]mmunity claims should be resolved as early in the case as possible—and by the court rather than the jury." *Id.* (citing *Elder v. Holloway*, 510 U.S. 510, ___, 114 S. Ct. 1019, 1023 (1994); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Elliot v. Thomas*, 937 F.2d 338, 344–45 (7th Cir. 1991)). In *Jones*, the defendants filed an interlocutory appeal asserting a defense of qualified immunity. *Id.* at 727. The district court had denied the defendants' summary judgment motion both with respect to the plaintiff's false arrest claim and with respect to the plaintiff's excessive force claim. With respect to the excessive force claim, the Seventh Circuit held that it had no appellate jurisdiction because the district court had found that an issue of fact existed as to whether the defendants beat the plaintiff while he was in custody, an issue that had to be "resolved in the district court before it could be reviewed on appeal." *See id.* at 727–28. With respect to the false arrest claim, the district court had held that "because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried." *Id.* at 728. The Seventh Circuit rejected that conclusion, finding that summary judgment should have been granted in favor of the defendants with respect to the false arrest claim because there was no genuine issue of fact and summary judgment is not a discretionary remedy. *Id.*

One could argue that *Jones* creates a circuit split as to whether there is discretion to deny summary judgment. However, despite its broad language disapproving of discretion to deny, the *Jones* court may have been particularly focused on the importance of resolving immunity claims early in the litigation.[10] A persuasive argument can be made that the need to resolve immunity issues

[10] The Seventh Circuit has repeated the language regarding the mandatory nature of granting summary judgment if the movant meets his burden. *See Anderson v. P.A. Radocy & Sons, Inc.*, 67 F.3d 619, 621 (7th Cir. 1995) ("Summary

played a strong role in the court's opinion, particularly given the absence of discussion distinguishing cases from other circuits that had recognized the existence of discretion to deny fully-supported summary judgment motions.

Other than the *Jones* case, the cases cited in the Letter do not substantively evaluate the discretion to deny summary judgment motions, despite having language stating that summary judgment is mandatory. For example, the Letter cites *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 857–58 (3d Cir. 2000), for the proposition that "[a] party's failure to make a showing that is 'sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of trial' mandates the entry of summary judgment." However, in *Watson*, the court affirmed a grant of summary judgment where the non-movant failed to make the required evidentiary showing. Because the Third Circuit affirmed a grant of summary judgment on the basis that the requisite showing was not made and because the case did not involve review of a denial of summary judgment (or of a grant of summary judgment where the court felt compelled to grant the motion despite wanting to deny it), the language stating that summary judgment is mandatory does not carry as much weight as suggested by the Letter.

Similarly, the Letter cites *Real Estate Fin. v. Resolution Trust Corp.*, 950 F.2d 1540, 1543 (11th Cir. 1992) (per curiam), for the proposition that "[a] district court must grant summary judgment if the moving party shows that there is no genuine dispute regarding any material fact and it is entitled to judgment as a matter of law." However, the cited language appears in the section of the opinion entitled "The Standards Governing Summary Judgment," and is not applied to the merits

---

judgment is not a remedy to be exercised at the court's option; it must be granted when there is no genuine dispute over a material fact.") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). However, in *Anderson*, the Seventh Circuit reviewed a grant of summary judgment rather than a denial.

because the case involved review of a grant of summary judgment, rather than a denial. The court affirmed part of the grant of summary judgment, but found that the non-movant had presented sufficient evidence to avoid summary judgment on one of the claims. Thus, the court had no reason to address whether there would have been discretion to deny summary judgment if there had not been sufficient evidence. The language regarding the mandatory nature of granting summary judgment is further weakened by the fact that a subsequent Eleventh Circuit decision involving an attempted appeal of a denial of summary judgment recognized discretion to deny summary judgment motions. *See Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001).

The Letter argues that the version of Rule 56 effective prior to the Style Amendments, containing the statement that "the judgment sought shall be rendered . . .," has language commanding mandatory action. However, the cases simply have not always interpreted the language that way. *See, e.g.*, *Payne v. Equicredit Corp. of Am.*, No. CIV.A. 00-6442, 2002 WL 1018969, at *1 (E.D. Pa. May 20, 2002) ("Despite this seemingly compulsory language [of Fed. R. Civ. P. 56(c)], the Supreme Court has recognized a district court's discretion to deny a summary judgment motion whenever there is 'reason to believe that the better course would be to proceed to full trial.'"), *aff'd on other grounds*, Nos. 02-2706, 02-2771, 2003 WL 21783757 (3d Cir. Aug. 4, 2003) (per curiam) (unpublished); *see also* EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE & PROCEDURE at 10, http://www.uscourts.gov/rules/supct1106/Excerpt_JC_Report_CV_0906.pdf (stating that the restyled rules "minimize the use of inherently ambiguous words," such as "shall," which "can mean 'must,' 'may,' or 'should,' depending on context"); FED. R. CIV. P. 56 advisory committee's note (2007 Amendment) (stating that "shall" is changed to

"should" in light of case law establishing that "there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact").

The assertion in the Letter that discretion to deny summary judgment would "run[] headlong into the concern expressed in *Anderson v. Creighton*, 483 U.S. 635, 643 (1987)[,] that conscientious public officials would lose the 'assurance of protection that [] is the object' of summary judgment," is misplaced. The quotation is taken slightly out of context because it omits the remainder of the sentence, which reveals that the quoted language was used in the case to describe the purpose of the doctrine of qualified immunity.[11] Nonetheless, it follows that requiring summary judgment regarding qualified immunity defenses would also further the assurance of protection that qualified immunity is intended to provide. However, even if courts may have less discretion to deny summary judgment in certain contexts, such as qualified immunity, *see Jones*, 26 F.3d at 728, it does not necessarily follow that it is mandatory in all circumstances where the Rule 56 standard is met.

IV. Conclusion

Most of the case law substantively evaluating whether there is discretion to deny a motion for summary judgment has determined that discretion to deny summary judgment exists when the movant has made the proper showing. The discretionary power of a court to deny a properly-supported motion for summary judgment has been summarized as follows:

> Although the court's discretion plays no role in the granting of summary judgment, since the granting of summary judgment under FRCP 56 must be proper or the action is subject to reversal on appeal, the court may deny summary judgment as a matter of discretion even where the criteria for granting judgment are technically satisfied. Denial of summary judgment is appropriate where the court has

[11] The full sentence actually reads: "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Anderson*, 483 U.S. at 643.

> doubts about the wisdom of terminating the case before a full trial or believes that the case should be fully developed before decision. For example, denial of summary judgment may be appropriate where the court has received inadequate guidance from the parties, where further inquiry into the facts is deemed desirable by the court to clarify the application of the law, where the motion is tainted with procedural unfairness, where a case involves complex issues of fact or law, or a question of first impression, or where summary judgment would be on such a limited basis or on such limited facts that it would be likely to be inconclusive of the underlying issues. In a case involving multiple claims, the court may exercise its discretion to deny summary judgment where it finds it better as a matter of judicial administration to dispose of all the claims and counterclaims at trial rather than to attempt piecemeal disposition, or where part of the action may be ripe for summary judgment but is intertwined with another claim that must be tried.

27A FED. PROC., LAW. ED. § 62:683 (2007).

Although there is plenty of case law with boilerplate language stating that a court must grant summary judgment if the Rule 56 standard is met, most of those cases at the appellate level do not involve review of a denial of a motion for summary judgment. Likewise, a review of a selection of some of those at the district court level reveals that most do not express that a motion is granted simply because of mandatory language in the rule when the court believes that the motion should be denied for administrative or other reasons. The one case the research uncovered that substantively involved review of a denial of summary judgment and that disapproved of that denial arguably may be limited in its application because it involved a request for summary judgment on qualified immunity grounds. While the court's language was broad, it also emphasized that immunity claims ought to be resolved early in the case, perhaps giving a stronger reason to remove discretion to deny a motion in that case than in the case of other summary judgment motions.

6C.

B. Rule 26(a)(2) and (b)(4): Expert Trial Witness Discovery

Introduction

These related proposals were discussed to great benefit at the Standing Committee meeting last January, providing a preliminary view of what might be coming and gaining the benefit of advance advice. The first proposal creates in Rule 26(a)(2)(C) a new obligation to disclose a summary of the facts and opinions of a trial-witness expert who is not required to provide a discovery report under Rule 26(a)(2)(B). (A conforming amendment is proposed for present Rule 26(a)(2)(C), to be redesignated as (D), addressing the time to disclose expert testimony.) The second set of interrelated proposals restrict some aspects of discovery with respect to trial-witness experts in response to the lessons of experience, not as a matter of high theory. The core changes extend work-product protection to drafts of Rule (a)(2)(B) expert reports and 26(a)(2)(C) party disclosures and also to attorney-expert communications. But three exceptions allow discovery as a matter of course of the parts of attorney-expert communications relating to compensation, identifying facts or data the attorney provided to the expert and that the expert considered in forming the opinions to be expressed, and identifying assumptions that the attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed. A parallel change is made in Rule 26(a)(2)(B)(ii), directing that the expert's disclosure report include "the facts or data ~~or other information~~ considered by the witness * * *."

Party Disclosure: Rule 26(a)(2)(A) requires a party to disclose the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The witness is required to provide a Rule 26(a)(2)(B) report only if the witness "is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." But some courts have required witness reports even as to experts outside these express limits.

It might be useful to expand the report requirement beyond the limits established in 1993, but requiring a report from every witness who presents expert testimony would also impose substantial burdens. The burdens are particularly acute with respect to physicians who have treated a party; cooperation even in discovery and at trial can be uncertain, and many lawyers fear they could not induce the physician to provide a report meeting the detailed requirements of (a)(2)(B). Similar problems can arise when an employee who does not regularly give expert testimony is an important witness, often as much for facts as for opinions. Still other witnesses, such as a public accident investigator, may be the same.

The proposed addition of new Rule 26(a)(2)(C) represents a balance between these competing forces. If a witness identified under (a)(2)(A) is not required to provide an (a)(2)(B) report, the party must disclose the subject matter of the expected expert testimony and a summary of the facts and opinions to which the expert is expected to testify. This disclosure will support preparation for deposing the witness, and in some settings may satisfy other parties that there is no need for a deposition.

Draft Reports and Attorney-Expert Communications: The background for these proposals traces back to the 1970 amendments that added an express work-product provision, Rule 26(b)(3), and at the same time made Rule 26(b)(3) "subject to the provisions of subdivision (b)(4)." Rule 26(b)(4), also new in 1970, provided for "[d]iscovery of facts known and opinions held by experts * * * acquired or developed in anticipation of litigation or for trial, * * * only as follows." What followed was a right to ask by interrogatory for the substance of the facts and opinions to which the expert trial witness is expected to testify; "further discovery by other means" could be ordered by the court. Many lawyers and courts found the interrogatory discovery an inadequate basis for preparing for trial; in many courts depositions of trial-witness experts became routine.

In 1993, building on experience with the 1970 amendments, expert trial-witness discovery was changed dramatically. The disclosure provisions of Rule 26(a), added for the first time, included the familiar (a)(2) expert disclosure requirements. A party must disclose "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." This disclosure must be supplemented by a report prepared by the expert, but only if the expert falls into one of two categories: "one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." An expert required to give this report may be deposed only after the report is provided.

The Rule 26(a)(2)(B) report is to include "(ii) the data or other information considered by the witness in forming [the opinions the witness will express]." The 1993 Committee Note included this statement:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Time has obscured the intended meaning of these words. They may have been meant only to say that discovery may be had of "the data or other information considered by the expert" no matter whether they were provided by counsel. But whatever was intended, they have taken on a far broader meaning. Moved by the disclaimer of "privilege[] or other[] protec[tion]," most courts now allow free discovery of draft expert reports and all communications between attorney and expert witness as "information considered by the expert."

As an abstract proposition, it may seem attractive to allow free discovery of all communications between counsel and an expert trial witness, and also to allow discovery of all draft reports. Any influence of counsel on the evolution of the opinions bears on the credibility of the opinions as the expert's independent view, not mere transmission of an advocate's position. An articulate minority of the lawyers who participated in the Discovery Subcommittee's first miniconference on this subject expressed that view forcefully. If it seems odd to limit privilege by a Committee Note to a Civil Rule, without invoking the special Enabling Act limits that require an Act of Congress to approve a rule creating, abolishing, or modifying an evidentiary privilege, 28 U.S.C. § 2074(b), it might be explained that the Note simply reflects an understanding of privilege rules as they were and as they would be applied in the new context established by the expert's duty to provide a disclosure report.

Consequences that surely were unforeseen in 1993 have demonstrated the pragmatic failure of any hope that expert opinions would be better tested by sweeping discovery of draft reports and attorney-expert communications. The result has been a regime that does not provide the anticipated information. It does not provide that information because attorneys and expert witnesses go to great lengths to forestall discovery. These strategies generally defeat discovery of valuable information, but lawyers persist in devoting costly deposition time to the vain quest for communications or drafts that may undercut an expert's opinions. Perhaps worse, these strategies impede effective use of expert witnesses. Effective use is impeded as to the opinion testimony because lawyers restrict free communications that might lead to more sophisticated and helpful opinions. Effective use also is impeded because lawyers hesitate to use a trial-witness expert for assistance with such responsibilities as understanding an adversary's expert's report and preparing for deposition or cross-examination at trial, or in evaluating a case for settlement. Additional cost flows from an offsetting practice of hiring "consulting" experts who, because they will not testify at trial, are protected against discovery by Rule 26(b)(4)(B). The consulting experts are used for the free explorations that are too risky to pursue with a trial-witness expert. A party who cannot afford the expense of a dual set of experts is put at a disadvantage.

One measure of these consequences is telling. Many outstanding lawyers have told the Committee that they routinely stipulate out of discovery of draft reports and attorney-expert communications. They find the costs of engaging in such discovery far higher than the infrequent small benefits that may be gained. Preliminary discussion at the January meeting demonstrated this reaction in convincing fashion.

The American Bar Association, acting on a recommendation by the Section on Litigation Federal Practice Task Force, has recommended amendment of federal and state discovery rules to address the problems that have emerged. The problems it described include these: Experts and counsel often go to great lengths to avoid creating draft reports, creating drafts only in electronic or oral form, deleting all electronic drafts, and even scrubbing hard drives to prevent subsequent discovery. Lawyers and experts often avoid written communications or creating notes by the expert, encumbering attorney-expert communications and the formulation of effective and accurate litigation opinions. Litigants often engage in expensive discovery seeking to obtain draft reports or attorney-expert communications, but gain nothing useful by it. Parties often retain two sets of experts, one for consultation and the other for testimony. Additional problems include reluctance to hire potentially superb experts who have not become professional witnesses, for fear that discovery of the necessary conversations that tell them how to behave as witnesses will destroy their usefulness. And many lawyers feel disheartened to have to pursue tactics — knowing their adversaries are doing the same — that they believe are necessary to protect against discovery but bring the litigation system into disrepute.

The encouragement provided by the ABA has been supported by experience under a New Jersey rule that limits discovery of draft reports and attorney-expert communications. The Discovery Subcommittee met with a group of New Jersey lawyers drawn from all modes of practice, private and public. The lawyers — who agreed that they disagree about many discovery problems — were unanimous in praising the New Jersey rule. Their enthusiasm leads them to extend protection beyond the formal limits of the rule, and often to agree to honor the state-court practice when litigating in federal court.

The proposals that have been developed through miniconferences, subcommittee meetings, countless conference calls, several Advisory Committee meetings, and the preliminary presentation to this Committee, seek to improve the use of expert testimony by correcting the unforeseen consequences that have emerged in the wake of the 1993 amendments. The seeming availability of broad discovery into draft reports and attorney-expert communications has failed to yield useful information in practice because lawyers and experts have developed coping strategies that generally defeat discovery efforts. Those strategies have entailed increased costs, most notoriously by increasing the simultaneous use of consulting experts and testifying experts. They also contribute in some cases to diminishing the quality of expert testimony because attorney and expert fear to engage in the open and robust discussions that would lead to better mutual understanding. In addition, they may diminish the opportunity to effectively challenge an adversary's expert when a party cannot afford to explore cross-examination and rebuttal with a consulting expert, and — fearing the possibility of discovery — refuses to consult with its trial-witness expert.

The proposed protection is not absolute. It invokes work-product standards that allow discovery of draft reports or attorney-expert communications on showing substantial need for the discovery to prepare the case and an inability, without undue hardship, to obtain the substantial equivalent by other means. In addition, free discovery is allowed of attorney-expert communications in the three categories noted above: communications as to compensation, facts or data considered by the witness in forming opinions, and assumptions provided by counsel and relied upon by the expert.

This balance between protection and discovery is calculated to provide at least as much useful discovery as occurs now, and at the same time to reduce practices that, fearing overbroad discovery, now impede the best use of expert trial witnesses.

Overview

The proposed amendments of Rules 26(a)(2) and 26(b)(4)(A) are set out below in traditional over- and underline form, along with a Committee Note.

The proposals are so brief as to require no further summary beyond the Introduction. The major points for discussion are described in the Detailed Discussion and Questions.

Rule 26. Duty to Disclose: General Provisions Governing Discovery

(a) Required Disclosures

* * * * *

(2) ***Disclosure of Expert Testimony***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses who must provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report -- prepared and signed by the witness -- if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them.

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Disclosure Regarding Testimony of Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report the disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(DC) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(ED) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

* * * * *

(b) Discovery Scope and Limits

* * * * *

(4) Trial Preparation; Experts.

(A) ***Expert Who May Testify.***

(i) *Deposition of expert witness.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) *Trial preparation protection for draft reports or disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft.

(iii) *Trial preparation protection for communications between party's attorney and expert witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to

provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- Relate to compensation for the expert's study or testimony;

- Identify facts or data that the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed; or

- Identify assumptions that the party's attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed.

* * * * *

Committee Note

Rule 26: Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony from those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4)(A) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and -- with three specific

exceptions -- communications between expert witnesses and counsel. Together, these changes provide broadened disclosure regarding some expert testimony and require justifications for disclosure and discovery that have proven counterproductive.

The rules first addressed discovery as to trial-witness experts when Rule 26(b)(4) was added in 1970, permitting an interrogatory about expert testimony. In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including -- for many experts -- an extensive report. Influenced by the Committee Note to Rule 26(a)(2), many courts read the provision for disclosure in the report of "data or other information considered by the expert in forming the opinions" to call for disclosure or discovery of all communications between counsel and expert witnesses and all draft reports.

The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts -- one for purposes of consultation and another to testify at trial -- because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses, often called "core" or "opinion" work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot. At the same time, attorneys often feel compelled to adopt an excessively guarded attitude toward their interaction with testifying experts that impedes effective communication. Experts might adopt strategies that protect against discovery but also interfere with their effective work, such as not taking any notes, never preparing draft reports, or using sophisticated software to scrub their computers' memories of all remnants of such drafts. In some instances, outstanding potential expert witnesses may simply refuse to be involved because they would have to operate under these constraints.

Rule 26(a)(2)(B) is amended to specify that disclosure is only required regarding "facts or data" considered by the expert witness, deleting the "or other information" phrase that has caused difficulties. Rule 26(a)(2)(C) is added to mandate disclosures regarding testimony of expert witnesses not required to provide expert reports. Rule 26(b)(4)(A) is amended to provide work-product protection for draft reports and attorney-expert communications, although this protection does not extend to communications about three specified topics.

Rule 26(a)(2)(B): Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment to Rule 26(a)(2)(B) is intended to alter the outcome in cases that have relied on the 1993 formulation as one ground for requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4)(A) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit the disclosure requirement to material of a factual nature, as opposed to theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material received by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Rule 26(a)(2)(C). Rule 26(a)(2)(C) is added to mandate disclosures regarding the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B). It requires disclosure of information that could have been obtained by a simple interrogatory under the 1970 rule, but now depends on more cumbersome discovery methods. This disclosure will enable parties to determine whether to take depositions of these witnesses, and to prepare to question them in deposition or at trial. It is considerably less extensive than the report required by Rule 26(a

)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement, reasoning that having a report before the deposition or trial testimony of all expert witnesses is desirable. See Minnesota Min. & Manuf. Co. v. Signtech USA, Ltd. 177 F.R.D. 459, 461 (D. Minn. 1998) (requiring written reports from employee experts who do not regularly provide expert testimony on theory that doing so is "consistent with the spirit of Rule 26(a)(2)(B)" because it would eliminate the element of surprise); compare Duluth Lighthouse for the Blind v. C.B. Bretting Manuf. Co., 199 F.R.D. 320, 325 (D. Minn. 2000) (declining to impose a report requirement because "we are not empowered to modify the plain language of the Federal Rules so as to secure a result we think is correct"). With the addition of Rule 26(a)(2)(C) disclosure for expert witnesses exempted from the report requirement, courts should no longer be tempted to overlook Rule 26(a)(2)(B)'s limitations on the full report requirement.

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(1)(A) and provide the disclosure required under Rule 26(a)(2)(C) with regard to their expert opinions.

Rule 26(a)(2)(D): This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C) just as they do with regard to reports under Rule 26(a)(2)(B).

Rule 26(b)(4)(A): Rule 26(b)(4)(A)(ii) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(b)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form of the draft, whether oral, written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); see Rule 26(a)(2)(E).

Rule 26(b)(4)(A)(iii) is added to provide comparable work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(A)(iii) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of routine wholesale discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying. The rule provides no protection for communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). It does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

Rules 26(b)(4)(A)(ii) and (iii) apply to all discovery regarding the work of expert witnesses. The most frequent method is by deposition of the expert, as authorized by Rule 26(b)(4)(A)(i), but the protections of (A)(ii) and (iii) apply to all forms of discovery.

Rules 26(b)(4)(A)(ii) and (iii) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, it may happen that a party is involved in a number of suits about a given product or service, and that a particular expert witness will testify on that party's behalf in several of the cases. In such a situation, a court should recognize that this protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(A)(iii), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by the expert witness personally or by another person associated with the expert in providing study or testimony in relation to the action. Compensation paid to an organization affiliated with the expert is included as compensation for the expert's study or testimony. The objective is to permit full inquiry into such potential sources of bias.

Second, consistent with Rule 26(a)(2)(B)(ii), discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. In applying this exception, courts should recognize that the word "considered" is a broad one, but this exception is limited to those facts or data that bear on the opinions the expert will be expressing, not all facts or data that may have been discussed by the expert and counsel. And the exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert witness to assume that certain testimony or evidence is true, or that certain facts are true, for purposes of forming the opinions they will express. Similarly, counsel may direct the expert witness to assume that the conclusions of another expert are correct in forming opinions to be expressed. This exception is limited to those assumptions that the expert actually did rely upon in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

The amended rule does not absolutely prohibit discovery regarding attorney-expert communications on subjects outside the

three exceptions in Rule 26(b)(4)(A)(iii), or regarding draft expert reports or disclosures. But such discovery is permitted regarding attorney-expert communications or draft reports only in limited circumstances and by court order. No such discovery may be obtained unless the party seeking it can make the showing specified in Rule 26(b)(3)(A)(ii) -- that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A contention that required disclosure or discovery has not been provided is not a ground for broaching the protection provided by Rule 26(b)(4)(A)(ii) or (iii), although it may provide grounds for a motion under Rule 37(a).

In the rare case in which a party does make a showing of such a substantial need for further discovery and undue hardship, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Rules 26(b)(4)(A)(ii) and (iii) focus only on discovery. But because they are designed to protect the lawyer's work product, and in light of the manifold disclosure and discovery opportunities available for challenging the testimony of adverse expert witnesses, it is expected that the same limitations will ordinarily be honored at trial. Cf. United States v. Nobles, 422 U.S. 225, 238-39 (1975) (work-product protection applies at trial as well as during pretrial discovery).

Detailed Discussion and Questions

Rule 26(a)(2)(C): Party Disclosure of Expert Testimony

(C) *Disclosure Regarding Testimony of Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report the disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(C~~D~~) *Time to Disclose Expert Testimony.* * * * Absent a stipulation or court order, the disclosures must be made: * * *

(ii) if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other psarty's disclosure.

Evidence Rules 702, 703, or 705: All discussions have concluded that it would be unwise to add Evidence Rule 701 to the list, whether for disclosing the identity of a witness who may testify to an opinion or inference under Rule 26(a)(2)(A) or for disclosing a summary of the facts and opinions.

No (a)(2)(B) Report: Many categories of witnesses who will present expert testimony at trial are not required to provide a disclosure report under Rule 26(a)(2)(B). The witness may be an employee whose duties as an employee do not regularly involve giving expert testimony. Or the witness may be a public official, such as an accident investigator. Treating physicians regularly provide testimony, and frequently present difficulties because testimony about such matters as prognosis and the cost of future care is challenged for failure to provide the report required when a witness crosses the line to become one retained or specially employed to provide expert testimony in the case. Often these and other witnesses present "hybrid" testimony that combines testimony provided as an actor or viewer of the events in suit with expert testimony.

A substantial number of reported cases have responded to the advantages that flow from Rule 26(a)(2)(B) expert reports by requiring reports from witnesses who are not covered by subparagraph (B). These decisions overlook the difficulties that may be encountered in attempting to persuade the witness to provide the report. Treating physicians are the example most frequently cited. They have busy careers devoted to purposes — caring for their patients — they may deem more important than preparing a detailed report that satisfies all six requirements of a (B) report. Another example is a highway patrol officer testifying to an accident investigation. A party's employee may present fewer problems of persuasion, but the report is likely to be dominated by the attorney in ways that make it no more useful than a summary.

A Summary of Facts and Opinions: The proposal bridges the divide between requiring no report and requiring a full (a)(2)(B) report. The party, not the witness, is required to disclose the subject matter of the expected evidence and a summary of the facts and opinions to which the witness is expected to testify. Many lawyers have assured the Committee that a summary will provide an adequate basis for preparing to depose the witness, and perhaps for examination at trial without incurring the expense of a deposition.

The draft discussed with the Standing Committee in January called for disclosure of the "substance" of the facts and opinions. This has been changed to "summary" in response to concerns that "substance" invites haggling over the level of detail required for adequate disclosure.

Later Subcommittee discussion addressed the question whether practical difficulties may arise from requiring even a "summary" of facts. One possible concern is that when a witness is expected to testify both on facts underlying the opinion and also on facts that are not related to the opinion, the rule might be read to require a summary of facts that are not involved in the opinions to be expressed. A second concern, less easily addressed by drafting changes, is that some witnesses will not be willing to devote enough time to informing counsel about the facts supporting their opinions. Two examples were a treating physician and a state accident investigator. The Subcommittee concluded that it is useful to require a summary of facts. There is little risk that facts will be required in addition to those that the witness relied upon in forming the opinions. And there is little risk that courts will exclude testimony when counsel has not been able to get a full summary from the witness — Rule 37(c)(1) enables sensible accommodation. These questions, however, will benefit from public comment.

Time To Disclose: The time to disclose an expert rebuttal witness should be the same, for the same reasons, whether the witness to be rebutted has provided an (a)(2)(B) report or a party has provided an (a)(2)(C) disclosure.

Incidental Points: The Committee decided that it would be unwise to clutter the rules by addressing two technical questions. A "hybrid" witness may have been deposed before a party discloses a

summary of expert testimony that was not explored at the deposition. It might be argued that a second deposition to explore the expert testimony can be had only with the court's permission under Rule 30(a)(2)(A)(ii), and also under Rule 30(a)(2)(A)(i) if the result is more than 10 depositions by the plaintiffs, or by the defendants, or by third-party defendants. The Committee anticipates that these issues will be resolved by common-sense application of the rules.

Rule 26(a)(2)(B)(ii): Disclose "Facts or Data"

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them;
* * *

"Facts," not "Information": The proposed change in Rule 26(a)(2)(B)(ii) is designed to support the proposed revisions of Rule 26(b)(4)(A). As described in the Introduction, the 1993 Committee Note and the reference to "information" in the rule text have led to the general view that attorney-expert communications and even draft disclosure reports are discoverable as information considered by the expert in forming the opinions to be expressed. Although Rule 26(b)(4)(A) will expressly apply work-product protection, it is better to clear away the history by deleting the reference to "information." The reference to "data" is retained. "Facts" might seem to embrace all data, but it is useful to cover abstract compilations of "data" that do not draw from the historic events in suit and that may rely on nonfactual statistical extrapolation from a set of fact observations smaller than the universe described by the data set.

Rule 26(b)(4)(A): Work-Product for Attorney-Expert Communications and Draft Reports

(b) DISCOVERY SCOPE AND LIMITS.

(4) *Trial Preparation: Experts.*

(A) *Expert Who May testify.*

(i) Deposition of expert witness. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) Trial preparation protection for draft reports or disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft.

(iii) Trial preparation protection for communications between party's attorney and expert witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the

communications, except to the extent that the communications:

- Relate to compensation for the expert's study or testimony;
- Identify facts or data that the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed; or
- Identify assumptions that the party's attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed.

(A)(i): Deposition before Rule 26(a)(2)(C) party disclosure: The rule text presented here as item (i) is taken unchanged from the present rule; only the tag line is new. That means that an expert not required to provide an (a)(2)(B) report may be deposed before a party makes the disclosure required by proposed (a)(2)(C). In many circumstances one party may depose a witness for fact information before another party discloses that witness as an expert and makes the disclosure. Familiar examples include treating physicians, a party's employee who has non-expert fact information, and a state accident investigator. The result may be two depositions of the same witness, and an increased need to take more than ten depositions. But as compared to an expert retained or specially employed, or an employee who regularly provides expert testimony, it seems unwise to attempt to regulate the sequence of deposition and party disclosure.

(A)(ii): Work-Product protection for draft reports: The proposal adopts work-product protection for drafts of any disclosure or report required under Rule 26(a)(2). Absolute protection might be too much — there may be circumstances (probably rare) in which a party has substantial need of a draft report. Even if the court orders discovery, the command of Rule 26(b)(3)(B) applies: the court must protect the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

For the same reasons, work-product is proposed to measure the protection of attorney-expert communications in item (iii).

(A)(ii): Regardless of the form of the draft: Invoking Rule 26(b)(3) presents a minor drafting challenge because it protects only documents and tangible things as trial preparation materials. The "common-law" doctrine established by Hickman v. Taylor is the only source of protection for other forms of work product. Earlier versions protected "drafts in any form." The same expression appeared in (A)(iii). That version was unclear to some readers. The present proposal uses more words, but should be clear: "regardless of the form of the draft."

(A)(iii): Communications between the party's attorney and expert: Earlier drafts referred to communications between "retaining counsel" and the expert witness. Uncertainties about this term focused on such matters as communications with an attorney for a coparty, or even between house counsel and an expert retained by independent counsel. The term becomes even more uncertain when dealing with a party's employee who regularly gives expert testimony. These doubts led to borrowing "the party's attorney" from Rule 26(b)(3)(A), where "the other party's attorney" has been used for many years without causing problems. The Committee Note explains, with brief examples, that this term should be interpreted functionally.

(A)(iii): Witness required to give (a)(2)(B) report: The purposes of ensuring work-product protection for attorney-expert communications focus on communications with a witness retained or specially employed to provide expert testimony or one whose duties as a party's employee regularly involve giving expert testimony. They are the witnesses required to provide reports under Rule 26(a)(2)(B), and the ones involved in the communications protected by the proposal. There is less need to protect

an attorney's communications with witnesses in the many other categories of experts. Communications with a client's employees often will be privileged. There is little reason to extend independent protection under (b)(4)(A) to such other witnesses as a treating physician or a state accident investigator. They do not have the same relationship to counsel as those who are protected.

(A)(iii): Communications not protected: Three exceptions to the work-product protection for attorney-expert communications are established. A single exchange between attorney and expert may touch on many matters, some within the work-product protection and others within one of the exceptions. Each exception applies only to the extent that the communication relates to or identifies matters falling into the exception. Discovery can, for example, reach facts or data identified by the attorney and considered by the expert, but communications discussing the meaning of the facts or data are protected by the work-product tests.

It is important to remember that the exceptions are relevant only to withdraw the work-product protection that otherwise would apply under item (iii). Discovery of matters outside an attorney-expert communication is not affected by item (iii). As one example, an expert might properly be asked how much compensation had been earned by testifying in other cases for this lawyer.

(A)(iii): Communications not protected — compensation: Communications that relate to the expert's study or testimony are the first of the three exceptions. "Relate to" has a broad reach. A running example of a communication relating to compensation has been the veiled offer of future work — "if you do well in this case, I have many more like it." Thus compensation for the expert's study or testimony is not limited to study or testimony "in the case," and includes compensation to the expert's firm even though it covers work done by others in the firm to support the expert's study or work.

(A)(iii): Communications not protected — facts or data: The expert report required by Rule 26(a)(2)(B) must contain the facts or data considered by the expert in forming the opinions to be expressed. Discovery properly extends to the source of those facts or data, including those identified by the attorney, in order to test the credibility of the opinions.

Repeated discussions always concluded that it is better to extend discovery to all facts or data "considered" by the expert, rather than only those "relied upon." It is important, both in discovery and at trial, to allow questions such as: "Did you consider X? If so, did it affect your opinion? If it did not affect your opinion, why not? If you did not consider X, why did you not consider it?"

It will not always be easy to answer the question whether an expert considered facts or data identified by the lawyer. An attorney might, for example, forward a complete medical history. The expert might quickly discard most of the file as irrelevant to the questions in the case. The rule text does not attempt to answer all questions in marking the point at which disregard means that facts or data identified by the attorney have not been considered.

(A)(iii): Communications not protected — assumptions for opinion: The third category held outside work-product protection is communications that identify assumptions the party's attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed. The attorney may, for example, instruct the expert to assume the facts that the attorney will undertake to prove through other witnesses, or to assume an opinion to be expressed by a different expert.

Work-product protection is withdrawn only as to assumptions the expert relied upon in forming the opinions to be expressed. It is important to know the origin of the assumptions that underlie the opinions. A communication identifying an assumption that was considered and rejected by the expert, however, is left within the general work-product protection for attorney-expert communications. The exploration of assumptions the expert does not rely upon falls within the purpose to foster full and free discussion in developing the opinions.

(A)(iii) Communications not exempted from protection — Scope of the expert's assignment: The Committee discussed a fourth possible exception that would allow free discovery of communications "defining the scope of the assignment counsel gave to the expert regarding the opinions to be expressed." This possible exception never gained sufficient support to justify refined redrafting. The Committee feared that as drafted for illustration the exception would effectively defeat any protection for communications. More importantly, the Committee concluded that the other three exceptions will support all appropriate discovery. Discovery of facts, data, and assumptions identified by the party's attorney will define the scope of the expert's assignment for all practical purposes. As noted above, protection for communications does not bar such questions as "Did you consider X in forming your opinion?" "Have you ever considered X in considering similar questions?" "Why did you not consider X this time?" If the expert answers the last question by saying "I cannot tell you why I did not consider X," the expert's credibility is destroyed. The expert remains free to answer instead "because the lawyer told me not to consider X."

Committee Note

The final paragraph of the Committee Note, addressing the impact of discovery limitations at trial, reflects difficulties frequently encountered in determining a Note's proper function.

As a discovery rule, Rule 26(b)(4)(A) does not directly address examination at trial about drafts of a disclosure or report of expert testimony, or about attorney-expert communications. The policies that underlie work-product protection, however, often carry over to examination at trial. A research paper on this topic by Andrea Kuperman, Judge Rosenthal's rules clerk, is attached. Among the reasons for incorporating work-product protection in (b)(4)(A)(ii) and (iii) is the expectation that courts will adopt the same approach in defining the limits of examination at trial. Many of those who have participated in developing these proposals believe that unless the protection is carried forward to trial lawyers will continue to engage with experts in the costly and inefficient ways that now impede effective development of expert testimony.

The Committee Note expresses an expectation that does not appear in the Civil Rule text — that "the same limitations will ordinarily be honored at trial." This statement raises the common question whether even this limited anticipation crosses the line that prohibits rulemaking by Note rather than rule text. New Civil Rules cannot properly usurp the role of the Evidence Rules. Rule text aimed at trial examination would be out of place. But the point is important.

A subsidiary question is presented by the final sentence, a "cf." reference to the Supreme Court decision stating that work-product protection applies at trial. Citing specific decisions in a Committee Note is approached with care. If a case is worth no more than a "cf." signal, its value is properly questioned. But there are good reasons both for including the citation and for guarding it. In one way the case provides particularly strong support — it was a criminal prosecution, adding weight to recognition of work-product protection at trial because there is no work-product provision in the Criminal Rules. But the protection was found waived in circumstances that cloud the extent of protection at trial. The decision is useful for indicating a general direction, but does not provide ready answers to specific questions.

The Committee concluded that it will be useful to include the final paragraph for publication, hoping that comments will provide further guidance.

MEMORANDUM

DATE: December 3, 2007

TO: Professor Richard Marcus

FROM: Andrea Thomson

CC: Judge Lee H. Rosenthal

SUBJECT: Protection of attorney-expert communications at trial

---

This memorandum addresses certain research questions that arose during the November 2007 Civil Rules Advisory Committee meeting with respect to potential changes to rules governing disclosure of attorneys' communications with testifying experts. The primary issue that has been the focus of my research thus far deals with the application of work product protection at trial. In particular, when discussing potential protections to attorney-expert communications, the question arose as to whether any such protection in Rule 26 could extend to trial because a protection that did not endure through the trial may not effectively deter the behaviors that such protections would be designed to avoid (*i.e.*, the retention of multiple experts and the artificial means of communicating with experts to avoid creating discoverable documents). In 1975, the Supreme Court dealt with the issue of protection of attorney work product and expert work product at trial in *United States v. Nobles*. However, as noted in your email and memorandum, a lot has happened since that case was decided, including the adoption of the Federal Rules of Evidence and the possible pertinence of Rule 612(2) of those rules. Your memo regarding the application of work product protections at trial identified outstanding questions on this issue, including: (a) whether *Nobles* has been followed, (b) whether a revision to Rule 26(b)(3) would also apply at trial (versus *Hickman v. Taylor* itself), (c) whether interactions with an expert should be regarded as protected by *Hickman* itself, and (d)

whether there are any cases involving invocation of work product protection at trial to limit questioning of an expert witness. This memo provides an overview of the results of my initial research on these issues, and a discussion of some of the case law I have found that may provide some guidance on these issues is described below.

I. Whether *Nobles* Has Been Followed

In *U.S. v. Nobles*, 422 U.S. 225 (1975), the Supreme Court recognized that work product protection extends to trial. In that case, the defense had hired an investigator who interviewed the prosecution's key witnesses. The investigator created a report, which was largely inaccessible to the government's attorneys. The defense called the investigator as a witness, and the court ordered that the report be produced to the prosecution. *Id.* at 229. The defense refused to produce the report, and the court then refused to permit testimony from the investigator regarding his interviews with the prosecution's witnesses. *Id.* Regarding the protection of work product at trial, the court stated:

> Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of the case. We need not, however, undertake here to delineate the scope of the doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protections.

Id. at 239. On the waiver issue, the court found that "[r]espondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony."[1]

---

[1] On this point, it has been noted that while testimonial use of privileged information may waive an evidentiary privilege, it is not proper to refer to the waiver as a waiver of work product protection. *See* Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 889 (1983). Anderson suggests that waiver of work product should not occur when a party discloses work product materials. *Id.*

> In a case where a party makes testimonial use of work product materials, a court would still hold that the party has waived protection of the documents involved, but only as to an evidentiary privilege, not as to work product immunity. The distinction is significant. The inherent unfairness associated with

Id. Justice White concurred, but wrote separately to express his view that *Hickman v. Taylor* had been viewed as a limit on the ability to obtain pretrial discovery, but not as a limit on the discretion of a judge to enter evidence at trial. *Id.* at 244, 246.

While the concurrence's strong disagreement in *Nobles* with the proposition that work product protection is available at trial may be enough to give at least some pause as to the doctrine's continued applicability at trial, at least some courts have subsequently followed the majority's view that work product protection extends beyond pre-trial discovery. For example, in *Nichols v. Bell*, 440 F. Supp. 2d 730 (E.D. Tenn. 2006), the court acknowledged that *Nobles* had recognized that work product protection extends to trial, but noted that no Supreme Court cases have since determined its scope at trial. *Id.* at 815. The *Nichols* court found that requiring disclosure of the memoranda prepared by the defendant's testifying medical expert was not a violation of the attorney work-product doctrine because the expert had testified on behalf of the habeas petitioner during the sentencing phase of trial. The court found: "Applying the principles of *Nobles* to the instant case, the state court's conclusion preventing petitioner from arguing the work-product doctrine to sustain a unilateral testimonial use of work product was not contrary to, nor an unreasonable application, of federal law." *Id.* at 816. Thus, in addition to approving of *Nobles*'s holding that work product protection extends to trial, the court also seemed to approve of the *Nobles* holding that testimonial use of work product at trial will waive any protection. In this case, the "testimonial use" seemed to involve testimony at trial regarding the expert's examination of the petitioner and interviews with

---

> 'testimonial use' of privileged materials that necessitates waiver of evidentiary privilege is not present when disclosures are made to third parties in the course of trial preparation. Calling such a waiver of evidentiary privilege a waiver of work product immunity is a misnomer.

Id.

others. In light of this testimonial use, the court found it appropriate to require disclosure of memoranda prepared by the expert in connection with the litigation. The issue in the *Nichols* case was whether the memoranda prepared by the expert were discoverable when the expert was to take the stand, so that court did not delve into the question of how far questioning could extend at trial with respect to the expert's communications with the retaining attorney or what other documents created by the expert, if any, might still be covered by work product protection.

In addition to finding no violation of work product protection by the disclosure of the memoranda, the *Nichols* court also approved of the state court's requirement that the petitioner turn over memoranda prepared by the testifying expert regarding his interviews with witnesses on the basis that the expert had failed to prepare a report and that the petitioner had failed to notify the prosecution that he intended to call a psychologist until after trial had begun. *Id.* at 816–17. The court found that the prosecutor had a substantial need for the material because he was prevented from rebutting the expert's testimony by retaining his own expert and that the state court had authority to impose a sanction. *Id.* at 817.

Other courts have likewise appeared to follow the *Nobles* holding that work product extends through trial, although some have done so simply by recognizing that testimony would waive any work product protection, rather than by explicitly stating that work product extends through trial. For example, in *Holder v. Gold Fields Mining Corp.*, 239 F.R.D. 652 (N.D. Okla. 2005), the defendant's consulting expert was listed as a potential testifying *fact* witness, and the opposing party sought to discover any documents related to the expert's proposed testimony. The defendants claimed that the requested documents were protected by the work product doctrine and that they would not know if and how the expert would testify at trial until after the plaintiffs had completed

their case-in-chief. *Id.* at 657. The court held that the documents were not *yet* discoverable because there would be no waiver *until the witness took the stand. See id.* at 659. The court concluded, however, that once the witness testified, documents he relied on in forming his opinion would become discoverable. The court stated that "clearly a witness cannot offer testimony based on documents that he simultaneously claims are protected work-product." *Id.* (citing *Nobles*, 422 U.S. at 239–40). The court held that "[i]f a witness testifies in reliance on work-product documents, a waiver of work product will be found." *Id.* However, the court concluded that simply listing the expert as a witness was not sufficient to find waiver, seeming to rely on the fact that until there was testimony, there was no disclosure of the work product such that it placed at issue all documents relating to the same subject matter. *Id.* at 659–60. The court seemed to imply that the result might have been different if the consultant had been listed as a proposed testifying expert witness (rather than a testifying fact witness) because under Rule 26(a)(2) all documents he considered in forming his opinion would be discoverable. *See Holder*, 239 F.R.D. at 660. The court concluded that if there was any doubt as to whether the witness was acting as a consultant or expert when he considered particular documents, it would be resolved in favor of discovery. *Id.* Thus, the court seemed to recognize that work product protection extended to trial, but that there could be a waiver through testimonial use of work product. The court seemed to believe that with respect to testifying expert witnesses, that waiver would extend to anything considered in forming the opinion,[2] but with respect to fact witnesses, the waiver might extend to documents related to the subject matter of the testimony.

---

[2] Because the court relied on Rule 26(a)(2) in reaching this conclusion, it is not clear that the result would be the same in the absence of the language in that rule providing for broad discovery of testifying expert witnesses.

In another analogous case, the court distinguished *Nobles* on the grounds that the expert in the case at bar did not testify at trial. *See John Doe Co. v. United States*, 350 F.3d 299 (2d Cir. 2003). In that case, the government filed a motion to compel the production of notes taken by the attorneys for the company being investigated by the grand jury during meetings with officials from the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). *See id.* at 300. After the investigation began, the company's attorneys submitted a letter to the U.S. Attorney's Office, arguing that the company had proceeded in good faith and that it had relied on statements made by ATF officials. *Id.* at 301. The government argued that this letter constituted a waiver of any privilege attaching to attorney notes made in connection with meetings with ATF officials. *Id.* The court held that there was no unfairness in preventing discovery because unlike in the scenario where the witness is providing testimony that needs to be rebutted, the government was not prejudiced when the company submitted its letter to the U.S. Attorney's office. *Id.* at 304. The court distinguished *Nobles* because the company had not offered testimony *as part of its defense at trial*, and held that telling the U.S. Attorney of its position was not sufficient to waive any privilege. *Id.* at 304–05. Although the *John Doe Co.* case did not address waiver of work product with respect to a testifying expert, its holding that there was no waiver of the attorney's work product here because there was no testimony at trial regarding the work product seems to reinforce the *Nobles* holding that work product protection does in fact extend through trial absent waiver (which can be accomplished by testimonial use of the work product, among other things).

In sum, it would appear that several courts have followed the holding in *Nobles* that work product protection extends past discovery and into trial, although the scope of the protection at trial remains unclear. The courts that recognize that work product protection extends to trial also seem

to acknowledge that "testimonial use" of work product will waive the protection. However, it is not entirely clear exactly what "testimonial use" entails and how broad the waiver will be when there is "testimonial use." For example, it may be that there is no waiver until the expert actually testifies (as opposed to when he is identified as a potential witness). As another example, it is not clear if putting an expert witness on the stand will open cross-examination up to anything and everything that the expert knows or whether it is simply with respect to material "regarding the same subject matter" as the testimony, or otherwise limited to facts and data considered by the expert.

One difficulty lies in the fact that courts tend to protect the right to cross-examine an expert witness to determine how he arrived at his opinion, and such cross-examination would not necessarily be limited to the facts and data considered. For example, a cross-examiner might inquire into the extent of the retaining attorney's involvement in developing the expert's opinion or suggestions made by the retaining attorney, arguing that these issues are relevant to bias and/or the credibility and validity of the expert's opinion. It seems unlikely that all courts would limit this type of cross-examination on an objection based on work product, because most courts are likely to find that any work product protection that extended to trial was waived by putting the expert on the stand, at least with respect to any inquiries into the credibility/validity of the opinion. Given the freedom that courts grant counsel in cross-examination of an expert witness, it seems unlikely that a court will allow the party presenting the witness much latitude in claiming work product when the witness is on the stand if the testimony has any relation to the work product. Even if a court were to limit cross-examination to questions regarding the facts and data considered by the expert, such a line of questioning might impinge on the expert's communications with counsel, and it is difficult to estimate where a court might draw the line in a particular case. For example, in a scenario discussed

during the November 21, 2007 call, in which the attorney directs the expert to conduct tests to be used in cross-examining the other side's expert, the permissible cross-examination of the expert conducting the tests might include inquiry into the tests directed by the attorney, even though they were not part of the expert's opinion for his testimony. It may be difficult to draw the line regarding what information was considered for the testimony and what was considered for other consulting purposes.

Yet another difficulty arises in that it is complicated to determine the impact of the 1993 amendments to Federal Rule of Civil Procedure 26 with respect to discovery of expert materials/communications. Given the report requirement in the rule and the statement that opposing parties are entitled to "data or other information considered by the witness in forming the opinions," it is unclear if decisions in the last 14 years permit broad discovery of testifying experts because of the language in the amended rule alone or if the same result would occur based on the common law regarding work product and waiver. As a result, it is useful to examine cases decided before the 1993 amendments to determine whether courts permitted discovery of attorney-expert communications or expert work papers prior to the addition of the report requirement. A circuit opinion addressing this issue prior to 1993 that contains useful analysis is *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984). In that case, the Third Circuit held that core work product is not discoverable simply because an attorney shows it to a testifying expert. The court held that the possibility of discovering in cross-examination that the expert's opinion originated with an attorney's thoughts was not sufficient to justify ordering disclosure of documents containing core attorney work product. *See id.* at 595 ("Even if examination into the lawyer's role is permissible, an issue not before us, the marginal value in the revelation on cross-examination that the expert's view may have

originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product."). The court did find that if the documents contained facts and data, a party could not avoid production simply by co-mingling the facts and data with an attorney's core work product. *See id.* In such a situation, the party would be required to redact any core work product and produce the remainder of the document revealing facts or data considered. *Id.* Judge Becker dissented, disagreeing with the majority's position that discovering whether the expert's view originated with an attorney is only of "marginal" value. *Id.* at 598. Judge Becker thought that even the majority's view would permit cross-examination regarding the attorney's role in shaping the expert's opinion, but that the issue was whether extrinsic evidence could be used to impeach the expert who denies that his opinion was shaped by an attorney. *Id.* Judge Becker felt that the majority's almost exclusive ban on extrinsic evidence containing core work product that was considered by the expert was contrary to other authority and to FED. R. EVID. 612. *Bogosian*, 738 F.2d at 599. Specifically, Judge Becker pointed to the opinion in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977), where it was held that core work product shown by counsel to a witness waived the work product protection. *Id.*

The Northern District of California took a view similar to that of Judge Becker's in *Bogosian* in *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991). In that case, the court held that communications between an attorney and a testifying expert were discoverable. The case involved a deposition of the expert (rather than testimony at trial), and the opposing party had sought to compel answers and documents related to the expert's communications with counsel. *Id.* at 385. The court found that after weighing the potential increased efficiency produced by precluding disclosure against reducing the risk of compromising the independence of experts, the choice was

easily in favor of disclosure of such communications, even if disclosure would reveal work product. *See id.* at 394. The court determined that there was much to be gained by finding out if the attorney shaped the expert's opinion, *see id.* at 396, a holding that would likely permit cross-examination regarding more than "facts or data considered" by the expert.

In another pre-1993 case, the Western District of Missouri found that a testifying expert's communications with counsel were discoverable. *See William Penn Life Assurance Co. of Am. v. Brown Transfer and Storage Co.*, 141 F.R.D. 142 (W.D. Mo. 1990). In that case, third-party defendants sought to compel the plaintiff's expert to answer deposition questions regarding the content of the expert's communications with plaintiff or plaintiff's counsel regarding the expert's opinion of the conduct of one of the third-party defendants. *Id.* at 142. The court agreed with the dissent in *Bogosian* and found that the third-party defendants were entitled to "explore the effect those communications [between plaintiff's counsel and the expert] had on the expert's formation of his opinion." *Id.* at 143.

Similarly, in *Inspiration Consol. Copper Co. v. Lumbermens Mut. Cas. Co.*, 60 F.R.D. 205 (S.D.N.Y. 1973), the court permitted discovery of documents created by the expert with respect to claims on which it had been indicated that he might be called to testify. In that case, an accountant wore three different hats in the litigation: (1) as a longtime auditor; (2) as an expert employed specifically for the litigation and who would not testify with respect to certain claims; and (3) as an expert who might testify at trial regarding claims that might be made in the alternative. *Id.* at 208–09. The court held that "for purposes of Rule 26(b)(4)(B) an independent accountant may wear two hats, that of a general auditor subject to normal discovery, and that of an expert specially retained for litigation, in which case discovery respecting preparation of the claim is limited by Rule

26(b)(4)(B) if he is *not* to be a witness at trial." *Id.* at 210 (emphasis in original). The court concluded that discovery was prohibited with respect to documents or opinions prepared in connection with the claim on which the expert would not testify. *Id.* However, the court stated that its holding was "not to be construed . . . as an anticipatory ruling on the scope of cross examination of Mr. Smith or of any other Price Waterhouse person who appears as a witness." *Id.* With respect to the alternative claim on which the expert might be called to testify, the court permitted discovery, but again emphasized that it was not ruling on admissibility or the scope of cross examination at trial. *Id.* at 211.

In addition, another pre-1993 case in the Northern District of California permitted discovery of all documents that were given to a testifying expert. *See Mushroom Assocs. v. Monterey Mushrooms, Inc.*, 1992 WL 442898 (N.D. Cal. 1992). In that patent suit, one of the co-inventors was designated as a testifying expert, and the defendants sought to discover all documents to which he had access, regardless of whether they were used in formulating his expert opinion. *Id.* The court ordered disclosure of all documents that the expert considered, whether they were rejected or relied upon, and noted that "considered" meant that the expert had reviewed the documents in preparation for his expert testimony. *Id.* The court declined to grant access to all documents he saw during the life of the patent (*i.e.*, in his role as co-inventor rather than his role as testifying expert) that he did not consider in forming his expert opinion. *Id.*

Finally, yet another pre-1993 district court case determined that an expert's documents were not protected under the work product doctrine. *See United States v. Real Property Known and Numbered as 2847 Chartiers Ave., Pittsburgh, PA*, 142 F.R.D. 431 (W.D. Pa. 1992). In that case, the government retained an expert to examine alleged gambling machines, and the expert prepared

a report that contained facts known and opinions held by the expert in connection with his examination of the machines. *Id.* at 432. The government contended that the report was not discoverable because it was work product prepared in connection with litigation and was thus protected under *Hickman*, as codified in Rule 26(b)(3). *Id.* at 433. The court held that *Nobles*'s holding that attorney work product extends to material prepared by agents for the attorney did not mean that an expert's knowledge and opinions become attorney work product simply because the expert is retained by an attorney in anticipation of litigation. *Id.* The court ruled that expert discovery was governed by Rule 26(b)(4) rather than 26(b)(3) and that most authority recognized that 26(b)(3) "work-product privilege" does not apply to discovery of experts' material. *Id.* at 434. The court also noted that materials prepared by an expert in anticipation of litigation were not protected even prior to the 1970 amendment adopting sub-section 26(b)(4). *Id.* (citations omitted).

Overall, it appears that the majority of pre-1993 cases permit discovery of expert communications with counsel and expert-created documents once the expert testifies at trial. This may mean that the 1993 amendments to Rule 26 regarding expert disclosures are not the sole reason for courts' unwillingness to shield attorney-expert communications or other documents shared with experts from discovery. It appears that the trend before 1993 was to allow access to these materials and communications, so it may be that the 1993 amendments codified the common law practice of allowing access to these documents. The relevance of investigating the effect of the 1993 amendments is that if the practice prior to those amendments was to shield certain expert materials or communications, and the effect of the 1993 amendments was to remove that shield, then the authority to replace the shield is more apparent. That is, if common law regarding work product applied to protect expert materials prior to the 1993 amendments, then the Committee should be able

to codify that common law. If the Rules Committee had the authority in 1993 to create a rule that in effect removed certain protections for expert documents and communications, then the Committee ought to have the authority to undo the effect of that amendment and return practice regarding experts to its pre-1993 state. However, an initial review of some of the pre-1993 case law on this topic reveals that it is not clear that removing the effect of the 1993 amendments would be to deny access to expert materials and communications.

II. Whether Rule 26(b)(3) or *Hickman* Would Apply to Work Product Protection at Trial

Another issue relevant to the analysis of potential amendments to rules governing expert discovery is, assuming work product protection does in fact extend through trial, whether a revised version of Rule 26(b)(3) could provide that protection at trial or whether *Hickman* itself would apply. A protection found solely in Rule 26 would appear to apply to discovery matters, not trial, particularly given the current title of that rule: "General Provisions Governing Discovery; Duty of Disclosure." Thus, absent further explanation, a protection for expert communications placed in Rule 26 would not necessarily apply through trial based solely on the text of the rule. On the other hand, to the extent that *Hickman* provides work product protection through trial, it is possible that Rule 26 could be read to include that same protection, given some courts' language stating that Rule 26 incorporates *Hickman*. *See Seal v. Univ. of Pittsburgh*, 135 F.R.D. 113, 114 (W.D. Pa. 1990) ("[T]he protection of work product arising from the case of *Hickman v. Taylor* . . . has been *supplanted* by Rule 26(b)(3) of the Federal Rules of Civil Procedure . . . ." (emphasis added)); *Airheart v. Chicago and N.W. Transport. Co.*, 128 F.R.D. 669, 671 (D.S.D. 1989) ("The work product doctrine had its genesis in *Hickman v. Taylor* and is now *fully expressed* in Rule 26(b)(3) of the Federal Rules of Civil Procedure . . . ." (emphasis added)); *but see* Gregory P. Joseph,

Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 106 n.18 (1996) ("Rule 26(b)(3) does not fully codify the work-product protection recognized in Hickman." (citing MOORE'S FEDERAL PRACTICE ¶ 26.15 at 26-292, 26-293 (1995))). However, if it is really true that *Hickman* has been fully codified in Rule 26, it might be argued that there is no protection for work product at trial because Rule 26 may govern only discovery and its replacement of *Hickman* may leave no protection remaining for work product at trial. Nonetheless, given that many courts appear to have approved of the *Nobles* holding that work product protection applies at trial, it is likely that some protection remains through trial.

At least one court has recognized that while Rule 26(b)(3) only protects work product in discovery, *Hickman* applies to protect work product at trial. *See Stansberry v. Schaad Prop.*, 1991 WL 11015266 (W.D. Va. 1991). In that case, the court confronted the question of whether an expert who was consulted by the plaintiffs but not ultimately retained could be called at trial by the defendants without violating the work product doctrine. *Id.* at *1. The court found that allowing the defendants to call the expert at trial would not be a *per se* violation of the work product doctrine, but held that the court would prevent against disclosure of work product at trial. *Id.* The court recognized that *Hickman* was "codified, in part, for pretrial discovery of documents and tangible objects by Federal Rule of Civil Procedure 26(b)(3) . . . ." *Id.* at *2. The court then cited *Nobles* for the proposition that work product protection exists at trial. *Id.* (citing *Nobles*, 422 U.S. at 239). The court concluded: "Thus, although Rule 26 is generally inapplicable at trial, the work-product doctrine as developed at common law controls." *Id.* This 1991 holding shows that, at least prior to the 1993 amendments, work product protection was recognized at trial for communications with experts under the common law. Even if the 1993 amendments have been interpreted to remove much of the

protection for the attorney-expert communications, both before and during trial, if the common law protected those communications before the amendments, then presumably additional amendments to the rules could recapture that protection both during discovery and at trial.[3] However, it also appears that the rule may not be able to do all the heavy lifting itself because it may only apply to pre-trial discovery. As discussed in the November 21, 2007 conference call, the amended rule could potentially provide discovery protection for attorney-expert communications, and encourage (via committee note) the courts to follow suit with respect to protecting those communications at trial as well.

Another reason that Rule 26(b) may not be able to officially protect work product at trial on its own is that an exclusion of relevant testimony at trial would appear to be an evidentiary exclusion rather than a limit on discovery. The relevant statutory scheme provides: "Any . . . rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b). While it is not clear exactly what constitutes an "evidentiary privilege," a rule directed to the exclusion of otherwise relevant evidence at trial is likely to fall into the category of modifying an evidentiary privilege. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5423 (1980).

> [T]he so-called "work product rule" was originally considered to be an immunity from discovery in civil cases rather than a true privilege. In this aspect, the doctrine falls within Civil Rule 26(b)(3). However, recently the Supreme Court has applied the doctrine to exclude trial preparation materials when offered in a criminal trial, a decision which has gone some way toward turning the immunity into a privilege. As such, the "work product" doctrine is within Rule 501.

---

[3] As noted earlier in this memo, this appears to be a protection that is waivable by calling the expert as a testifying expert at trial, although the extent of waiver remains unclear.

Id. (citing *Nobles*, 422 U.S. 225). Thus, if the revised rule does not specify that it applies at trial, it is not clear that it would automatically apply at trial, and if the rule does specify that it applies at trial, then it might be subject to criticism for avoiding the procedure required by section 2074(b) for creating or modifying a privilege. *See* Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 106 (1996) (Under some interpretations, "Rule 26(a)(2)(B), alone or in conjunction with Rules 26(b)(3)-(4), makes waiver of core work-product an unavoidable cost of putting an expert forward to testify. If core work-product is an 'evidentiary privilege,' and if mandating the waiver of this 'evidentiary privilege' constitutes 'abolishing or modifying' it, § 2074(b) has to that extent been contravened and Rule 26(a)(2)(B) is to that extent invalid. Because § 2074(b) has not been construed, the meaning of these operative phrases is not settled.").

III. Whether Interaction With Experts Should Be Regarded as Protected by *Hickman* Itself

The question has also been raised as to whether interaction with experts should be regarded as protected by *Hickman*. If so, then it may be easier to overcome challenges to a proposed amendment because the amendment would essentially be a codification of an already existing doctrine. The committee notes to the 1970 amendments to Rule 26, which substantially codified *Hickman*, indicate that *Hickman* left open the issue of whether the work product doctrine extends to the preparatory work only of lawyers. FED. R. CIV. P. 26 advisory committee's note (1970 Amendment). The post-1970 case law does not clarify this issue because once Rule 26 substantially codified *Hickman*, courts largely relied on the rule itself to determine the scope of expert discovery, not on *Hickman*, making it difficult to determine if *Hickman* itself provides protection for these communications and interactions. *See, e.g.*, *United States v. Real Property Known and Numbered*

as 2847 Chartiers Ave., Pittsburgh, PA, 142 F.R.D. 431 (W.D. Pa. 1992) ("*Chartiers*") (noting that the *Hickman* principles have been codified in Rule 26(b)(3) and that expert discovery is governed by Rule 26(b)(4) rather than 26(b)(3)). In *Chartiers*, the court noted that the advisory committee note to Rule 26 "expressly states that the committee 'reject[ed] as ill-considered the decisions which have sought to bring expert information within the work product doctrine.'" *Id.* at 433 (citing FED. R. CIV. P., West's 1991 Revised Edition at 87). There is other language in the committee note that indicates that there were very few decisions before the 1970 amendments that protected expert information from discovery. *See* FED. R. CIV. P. 26 advisory committee notes (1970 Amendments) ("These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert.") (citing *Am. Oil Co. v. Penn. Petroleum Prods. Co.*, 23 F.R.D. 680, 685–86 (D.R.I. 1959)). The fact that *Hickman* was largely codified in Rule 26, coupled with the fact that the committee notes disapproved of strong discovery protections for expert materials, make it difficult to assess whether *Hickman* actually provided that protection and the amended rule then reduced it,[4] or if strong protection for expert materials never truly existed.

IV. Case Law Involving Invocation of Work Product At Trial to Limit Questioning of an Expert Witness

I have not encountered any cases directly involving invocation of the work product doctrine at trial to limit questioning of an expert witness. Most of the relevant case law focuses on obtaining testifying experts' documents and draft reports, which seem to be generally discoverable under the

---

[4] Clearly, some protection of certain expert materials did survive the amendments. *See, e.g.*, *Krisa v. Equitable Life Assurance Soc.*, 196 F.R.D. 254, 259 (M.D. Pa. 2000) ("The policy reasons supporting the 'bright-line' rule in favor of disclosure of materials disclosed to an expert are not compelling and ignore the policy considerations that compel protection of core work product.").

current version of the rule. Of the cases I have seen thus far, the one most relevant to this issue is *New Mex. Tech. Research Found. v. Ciba-Geigy Corp.*, 1997 WL 576389 (D.R.I. 1997), which involved inquiry into work product during the deposition of a testifying expert. In *Ciba-Geigy*, the plaintiff's testifying expert was deposed and opposing counsel inquired into whether the plaintiff's counsel had expressed to him their views on the case and on infringement of the patent-in-suit, and whether they had discussed their interpretation of relevant claim terms used in the patent. *Id.* at *1. The questions called for only a "yes" or "no" answer, but the plaintiff's counsel objected on the basis of work product. *Id.* The parties agreed that follow-up questions would have gotten into work product, but apparently disagreed regarding the initial questions. *See id.* In addition to objecting to questioning, the plaintiff's counsel withheld several documents, including: (1) several authored by the expert having notes made by the expert during conversations about the case with plaintiff's counsel; (2) a document authored by the expert and the plaintiff's counsel, described as a "draft supplemental expert report reflecting mental impressions of counsel; and (3) a document authored by the plaintiff's counsel with a copy sent to the expert described as "notes reflecting mental impressions of counsel." *Id.* at *2. The defendants took the position, relying on *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991), that any communications, written or oral, given by counsel to a testifying witness, are discoverable, even if they would ordinarily be protected by the work product doctrine. *See Ciba-Geigy*, 1997 WL 576389, at *3. The court rejected this approach, finding more compelling the reasoning in *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995), which would protect an attorney's core work product. *Ciba-Geigy*, 1997 WL 576389, at *5. However, the court noted that even the *Haworth* analysis "does not eliminate discovery of the bases for the expert's opinions or the source of the facts on which the expert relies,"

and that "the expert is not insulated from all discovery." *Id.* The court quoted *Haworth* regarding how to determine whether a question posed to an expert is proper:

> "Whether a question is improper depends upon the question. If the question regards mechanical advice on the preparation of the expert report, the question is not objectionable. If the question tests whether certain facts had not been provided the expert for his consideration, the question would be proper as well. Opposing counsel may test whether the witness's report accurately reflects all the facts actually considered. Opinion work product protection is not triggered unless 'disclosure creates a real, nonspeculative danger of revealing the lawyer's mental impressions' and the attorney had 'a justifiable expectation that the mental impressions revealed by the materials will remain private.'"

Id. (quoting *Haworth*, 162 F.R.D. at 296 (quoting *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015–16 (1st Cir. 1988))). The court held that the questions posed at the deposition would require revealing counsel's opinions about the case, whether there had been infringement of the patent, and counsel's interpretation of terms in the patent, and that they were therefore objectionable. *Id.* at *6. The court likewise denied access to the documents. *Id.*

It may also be possible to analogize cases regarding the discoverability of documents provided to testifying experts to the scenario where the expert is questioned on the stand regarding information claimed to be subject to work product immunity. Presumably, if courts will limit discovery of certain categories of work product even after it is shown to a testifying expert, then it seems likely that courts would also limit questioning at trial regarding the same categories. And the converse is likely true as well—if the court will permit pre-trial discovery of work product shown to an expert, surely it would permit inquiry into work product at trial. As to this line of cases, there appears to be a split of authority as to whether to protect core work product once it is shown to a testifying expert.

Those cases holding that core work product is discoverable if given to a testifying expert seem to focus on the theory that if the attorney is going to shape the expert's view, then the opponent is entitled to inquire into the attorney's participation, and on the fact that the attorney has control over the amount of work product given to an expert, if any. These cases hold that if the attorney is concerned about discoverability, the attorney can simply be careful about giving core work product to the expert.[5] For example, in *Elm Grove Coal Co. v. Director, Office of Workers' Comp. Programs*, 480 F.3d 278 (4th Cir. 2007), the court heard an administrative law action governed by administrative law rules of procedure containing a provision that matched federal Rule 26(b)(3), with the exception of the 1993 amendment regarding expert disclosures. *See id.* at 300. The court determined that the expert could not be properly and fully cross-examined in the absence of draft reports and attorney-expert communications. *Id.* at 301. The court found that "other courts, under both pre- and post-amendment Rule 26, have mandated the production of similar draft reports and attorney-expert communications with respect to testifying experts," *id.* at 301, but noted a split of authority: "We recognize that certain courts, both before and after the 1993 amendments to Rule 26, have determined that draft reports provided to testifying experts and attorney-expert communications are entitled to varying degrees of work product protection," *id.* at 302 n.24 (citing *Bogosian*, 738 F.2d 387; *Nexxus Prods. Co. v. CVS N.Y., Inc.*, 188 F.R.D. 7, 10–11 (D. Mass. 1999)). The court continued: "We are unpersuaded by this line of decisions [protecting draft reports shown to testifying experts and attorney-expert communications as work product] and, as discussed herein, believe that the vastly superior view is, consistent with the 1993 amendments to Rule 26, that such attorney-

---

[5] This theory runs into the very problem that an amendment to the rule would be aimed at solving – the use of two sets of experts so that the attorney has one set that she can discuss theories with and another set that will testify.

expert communications are not entitled to protection under the work product doctrine." *Elm Grove Coal*, 480 F.3d at 302 n.24. The court concluded: "In sum, draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine." *Id.* at 303.

Similarly, in *Energy Capital Corp. v. United States*, 45 Fed. Cl. 481 (Ct. Fed. Cl. 2000), the case was governed by the rules of procedure for the Court of Federal Claims, which contained a rule governing expert discovery that matched federal Rule 26 before the 1993 amendments. 45 Fed. Cl. at 493. The court stated, "All cases of which this court is aware have required that the production of factual information given by an attorney to an expert must be produced. In addition, courts also require the production of the information and opinion provided by an expert to the attorney." *Id.* at 493–94 (internal citations omitted). However, on the issue of whether the party must produce documents that reveal opinion work product, the court found that other courts had reached varying results. *Id.* at 494. The court concluded:

> [T]his Court finds that the policy arguments favor the production of all materials given to experts. Complete disclosure promotes the discovery of the true source of the expert's opinions and the detection of any influence by the attorney in forming the opinion of the expert. In addition, the attorneys can minimize how much the other side learns of their opinion work product by monitoring what information is provided to the expert. . . . Lastly, a clear line is easier to administer and a predictable result helps litigants plan their strategy.

Id.

In yet another case, the Eastern District of New York found all documents "considered" by the expert to be discoverable, but focused its reasoning on the 1993 amendments to the federal rules. *See Weil v. Long Island Sav. Bank FSB*, 206 F.R.D. 38, 39–40 (E.D.N.Y. 2001) (collecting cases that

have held that the 1993 amendments require that anything disclosed to a testifying expert must be produced to opposing counsel, whether or not the expert relies on the disclosed material). The court noted a split of authority on the issue of the protection of core work product given to an expert. *Id.* at 40. The court concluded that even core work product is discoverable if given to a testifying expert because such discovery would lead to more effective cross-examination and would reveal counsel's involvement in forming the expert's opinion. *Id.* at 41. The court also focused on the attorney's ability to decide whether to provide the expert with work product material. *Id.* at 42.

In contrast to those cases permitting discovery of core work product, those courts finding that core work product is not discoverable after disclosure to a testifying expert have focused on the fact that Rule 26(b)(3) is subject to Rule 26(b)(4), which grants broad discovery of expert witnesses, but that nothing in either section suggests that core work product is discoverable under (b)(4). For example, in *Krisa v. Equitable Life Assurance Soc.*, 196 F.R.D. 254 (M.D. Pa. 2000), the court rejected a bright-line rule that materials given to a testifying expert are automatically discoverable, and exempted core work product from discovery. The *Krisa* court determined that a bright-line rule in favor of requiring production of attorney work product shown to a testifying expert would "abridge[] the attorney work product privilege without specific authority to do so." 196 F.R.D. at 260. A pre-1993 example of a case finding that core work product is not discoverable after showing it to an expert is *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984) (finding that the proviso in the first sentence of Rule 26(b)(3) beginning "[s]ubject to the provisions of subdivision (b)(4) . . .," does not limit the second sentence of Rule 26(b)(3), which restricts disclosure of work product revealing "mental impressions" and "legal theories").

In sum, my research so far has not uncovered case law involving the situation where an

expert took the stand at trial and there was an objection based on inquiry into work product. As noted, however, this may be the result of the broad expert discovery permitted by the 1993 amendments and the corresponding committee notes. While it may be possible to analogize cases regarding the discoverability of materials given to an expert or attorney-expert communications to the situation of questioning an expert witness on the stand, even that analogy does not add much clarity because it appears that there has been a split of authority, both before and after the 1993 amendments, as to whether core work product will be shielded from discovery when shared with a testifying expert.

V. Conclusion

Overall, it appears that the majority of authority holds that work product protection does in fact extend through the trial. Thus, the concern that a rule amendment would not actually deter parties from retaining a second set of experts if the protection would simply disappear at trial may be somewhat alleviated by the general acceptance of the proposition that work product protection extends through trial. However, under the current regime, it also appears that there is a strong risk of waiver of work product protection when an expert who has been exposed to work product is put on the stand. The extent of the waiver is unclear, and it is difficult to remove the impact of the 1993 amendments to determine whether the common law would provide protection for work product shared with testifying experts absent the contrary implication of the 1993 amendments. Even prior to the 1993 amendments, the case law was unclear as to the extent of protection for work product shared with a testifying expert. Thus, although work product immunity may extend through trial as a general proposition, the interest in permitting effective cross-examination may remove that protection, at least to some extent, for testifying experts. Because the extent of work product waiver

that may be found with respect to a testifying expert is unclear, and because it may be difficult for Rule 26 to officially provide protection through trial without modifying a privilege, it may be difficult to fully prevent the cautious party with sufficient resources from hiring two sets of experts and avoiding written communications with testifying experts. Nonetheless, as discussed in the November 21, 2007 conference call, it may be that a limit on discovery of expert materials in Rule 26, coupled with an advisory committee note encouraging courts to maintain the protection through trial, will go a substantial distance in preventing the undesired behaviors.

6D.

III INFORMATION ITEMS

The Committee considered the current installment of the Federal Judicial Center study of the impact of the Class Action Fairness Act of 2005 on the federal courts. This first phase of the study examines the rates of original class-action filings and removals. The total number of class actions in federal courts has grown substantially since CAFA was enacted, but much of the growth has been in federal-question actions, particularly labor cases. The increase in diversity actions prompted by CAFA has been remarkably close to the annual increase of 300 actions predicted by the Judicial Center. The increase has come mainly in contract, consumer-protection, and tort property-damage cases. Tort personal-injury cases have declined, perhaps because it seems to be increasingly difficult to persuade courts to certify class-action treatment in these cases. The increase in diversity class actions has been widely spread among courts in the different circuits, although some circuits have experienced more pronounced increases than other circuits. The next phase of the study will compare the characteristics of class actions brought to federal courts before CAFA with those brought after. One pair of comparisons will focus on diversity class actions, taking an intense look at how they are handled. The second pair of comparisons will focus on federal-question cases, primarily to determine whether there has been an increase in the addition of state-law claims.

The Committee also heard a report on the work of the Administrative Office to review and revise the many forms it has created for clerk's offices and for use by lawyers. It was noted that the Civil Rules forms have never been submitted for review by the Advisory Committee. Examples were provided for examination. The Administrative Office is considering whether it should change the process of generating these forms, including the possibility of seeking review by a relevant rules advisory committee.

Possible future Civil Rules projects were noted. Professor Gensler will prepare a prospectus on the question whether it is desirable to undertake amendment of Rule 26(b)(5)(A) to provide more specific guidance for practice in creating privilege logs. The Committee will continue to study developing practice in response to the notice-pleading decision in the Twombly case, and may begin to consider the range of possible responses at its next meeting. A study of the impact of the e-discovery amendments also may be undertaken, although it is hoped that the amendments will work well enough in the first few years to justify a deliberate approach. And it may be that the Committee will revive the long-stagnating effort to develop simplified procedures for some categories of cases; the effort may seem more promising if some new approach is identified.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 7-8, 2008

The Civil Rules Advisory Committee met on April 7 and 8, 2008, in Half Moon Bay, California. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Hon. Jeffrey Bucholtz; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Robert C. Heim, Esq.; Judge John G. Koeltl; Chilton Davis Varner, Esq.; Anton R. Valukas, Esq.; and Judge Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Joe Cecil and Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., and Greg Katsis, Esq., Department of Justice, were present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joe Fagel, Esq.; Francis Fox, Esq.; Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison); Mark Landis, Esq.; Ken Lazarus, Esq.; Joe Fagel, Esq.; and Professor Brooke Coleman.

Judge Kravitz opened the meeting by noting occasions for joy and sadness.

The Committee was saddened to learn of Judge Sam C. Pointer, Jr.'s, death. Judge Pointer chaired the Committee from 1991 to 1993. His ongoing impact on the Committee and its work endured for many years after. He brought the 1993 disclosure and discovery amendments to a successful conclusion. He launched the decade-long work of revising Rule 23, beginning with a draft that completely restructured all of class-action practice; later work was measured in large part by whittling down ideas that seem too bold for present implementation but that will remain as important guides for any future work. He volunteered the Civil Rules to be first in the Style Project, and personally made hundreds of revisions in the first draft prepared by Bryan Garner. The "Garner-Pointer" draft became the foundation for successful restyling when the project was resumed after a hiatus to study and learn from the restyling of the Appellate and then the Criminal Rules. As a judge, he continued to be involved in the work of the American Bar Association, to contribute to many other collaborative projects that advanced good procedure, and to demonstrate innovative and often-emulated advances in procedure for resolving the cases that came before him. His work to coordinate the work of the myriad courts involved in the silicone-gel breast implant litigation was particularly imaginative and important. And his work as a practicing lawyer compensated in some measure for the loss when he retired from the bench.

Occasions for joy include the recent marriage of Andrea Kuperman. The loss of Judge Filip as a Committee member would be sad, but the loss fades before his confirmation as Deputy Attorney General. It is equally a pleasure to have Greg Katsis present for the meeting and to anticipate his imminent confirmation as Assistant Attorney General for the Civil Division.

Another happy event is the appointment of new Committee member Judge Colloton. He has had extensive experience in the Department of Justice, in the Independent Counsel's Office, and as United States Attorney for the Southern District of Iowa before appointment to the Eighth Circuit.

Judge Kravitz turned to the agenda, noting that it includes two massive topics in Rule 56 and the revisions of the Rule 26 treatment of expert trial witnesses. Other topics are familiar, but require the close attention needed for all final recommendations. These include the Time-Computation Project and review of the proposals published for comment in August 2007.

November 2007 Minutes

The draft minutes for the November 2007 meeting were approved, subject to correction of typographical and similar errors.

Rule 56

Judge Baylson introduced the Rule 56 Subcommittee report. He began by noting that the Federal Judicial Center has continued its Rule 56 research, and has worked diligently to respond to questions the Committee raised during reports on earlier phases of the research. The results of this work are important in framing recommendations for revision.

Joe Cecil described the report that was submitted for this meeting. It describes experience in the district courts by grouping them in three categories according to their local rules. In the first group, a movant is required to provide a detailed statement of uncontested facts with references to the record and a nonmovant is required to respond in the same form. In the second group, the movant is required to provide the statement and references but the nonmovant is not required to respond in kind. The third group does not have any comparable requirements. In many ways the most significant finding was that there are few differences among the groups in the frequency of motions, or the rate of grants or denials in whole or in part. These similarities held true across different types of cases. But three of the tables attached to the report are particularly interesting.

Table 3 shows that courts that have point-counterpoint requirements similar to those proposed in draft Rule 56 decide a higher fraction of summary-judgment motions than other courts. Some part of the explanation may be that in the other districts a higher portion of the cases are settled before the motion is decided, but that simply leads to the question whether the settlement rate is affected by the summary-judgment practice. Perhaps motions are made earlier in point-counterpoint districts in relation to development of the case. The point-counterpoint structure, for whatever reason, does seem to encourage decision of the motions.

Table 5 shows that courts take longer to decide summary-judgment motions in the point-counterpoint districts. That might be tied to the higher rate for actually deciding them. Supplemental analysis suggested other reasons — these districts have higher median weighted case loads, greater numbers of pending cases per judge, and require more time to reach disposition in all cases.

Table 12 shows that the percentage of cases terminated by summary judgment is similar across all three district types. The greatest divergence is in employment discrimination cases; termination by summary judgment occurs in 13% of these cases in point-counterpoint districts, 10% in "movant only" districts, and 9% in districts that do not require detailed fact statements by either movant or nonmovant. (Judge Baylson noted that Tables 2 and 3 show a higher rate of motions in employment cases than any other category of cases, and also a higher rate of granting in whole or in part, in all types of districts.)

The tables highlight dimensions in which there is a greater than 5% difference among the types of districts. This figure, however, is arbitrary; it was chosen for purposes of drawing attention. The familiar "95%" threshold of statistical significance is used in considering the results of sampling studies. It does not apply when, as in this study, an entire population is studied. This study began with all cases terminated in fiscal 2006. It was whittled down by excluding some categories of cases in which the number of cases is imprecise, and other categories in which summary judgment motions are not likely to be made. Cases from three districts were excluded because useable CM/ECF data and local rule information were not available. The result was a population of 155,803 cases — 56%

of cases terminated in fiscal 2006. At least one summary-judgment motion was made in 23,725 of these cases; in all, 46,633 separate motions were analyzed.

Discussion of the FJC study began by asking whether the rate of motions and grants in employment discrimination cases suggests that the point-counterpoint structure in proposed Rule 56 encourages too many partial or full summary judgments. It was noted that there are many possible explanations apart from the structure of the practice. One distinction is the burden-shifting "prima facie case" rule. Another is a perception that complaints in these cases often advance every conceivable theory against every conceivable defendant; many of the grants simply pare down the case to the solid core of potential claims and plausible defendants.

It also was noted that the tables must be read carefully. Table 12, describing cases terminated by summary judgment, refers to complete termination of the case. Table 3, referring to motions "granted in whole," refers to granting all of the relief requested by the motion — often that is less than termination of the whole case.

The "no disposition" information from Table 3 was described by one committee member as "astonishing." The range is from 50% in the point-counterpoint districts to 62% in the districts that require only the movant to provide a detailed statement and 58% in the other districts. The theory that settlement often intervenes between the motion and disposition simply leads to the question why settlement did not happen earlier. The study will continue to explore these issues. There are some indications that the districts that do not have point-counterpoint requirements resolve more cases by other dispositive motions.

Concern about the motions not resolved was expressed from a different perspective. Lawyers have complained that some judges refuse to decide Rule 56 motions, pushing toward trial in the hope of coercing a settlement. But it will be difficult to tease out an answer to this fear from studying docket information. It will be possible to find out how long the unresolved motions were under consideration, and whether trial actually started in the "motion unresolved" cases.

Another possibility to remember is that point-counterpoint motions may be decided more frequently because it is easier to decide a motion that has been carefully presented.

It would be possible to get more information by taking a hard look at a sample of perhaps 1,000 case files. But the questions to be asked would have to be defined in order to identify the sample. If the study were to focus on the "no disposition" question, for example, the sample of cases would be drawn differently than the sample that might be used to explore employment discrimination cases. The actual file studies would be done by law students working with a carefully drawn study protocol.

Judge Kravitz expressed the Committee's thanks and appreciation for the excellent work done by the FJC. As with other studies done for the Committee, this work has been very important and helpful.

Judge Baylson then presented the Rule 56 Subcommittee report. He identified a set of issues for consideration from those identified in — and by — the footnotes in the agenda book version.

Motion on whole action (notes 1, 24): Note 1 raises a question that has recurred. Draft Rule 56(a) begins by stating that "[a] party may move for summary judgment on all or part of a claim or defense." The Style convention is to draft in the singular, understanding that this language authorizes a motion that addresses every claim and every defense in the action. But it has been

suggested that the rule text should explicitly refer to case-terminating motions, perhaps as "summary judgment on the action or on all or part of a claim or defense."

Discussion noted that this question also is presented by subdivision (g), which addresses partial summary judgment and, as presented, begins by addressing the situation in which summary judgment is not granted on the whole action. In the end, subdivision (g) was revised to address the situation in which the court fails to grant all the relief requested by a motion for summary judgment. The distinction will be further sharpened by adding to the tag line for subdivision (a), which will read: "(a) Motion for Summary Judgment or Partial Summary Judgment."

"Should" or "must" grant (notes 2, 3): Rule 56 originally stated that summary judgment "shall" be granted when there is no genuine issue as to any material fact and the moving party is "entitled" to judgment as a matter of law. The 2007 Style version of the rule translates "shall" as "should." The 2007 Committee Note explains that this rendition of the ever-ambiguous "shall" was necessary to reflect the cases that recognize discretion to deny summary judgment even when the movant apparently has carried the Rule 56 burden of showing there is no genuine issue.

"Should" has met continuing resistance even after Style Rule 56 took effect. Defendants, more than plaintiffs, are likely to protest that there should be no discretion to force on them the burdens of trial if a sufficient summary-judgment showing has been made. Andrea Kuperman studied a large number of cases in response to this concern. She found several cases, including cases from several circuits, explicitly recognizing discretion to deny summary judgment. She also found many cases that repeat the common refrain that summary judgment is a matter of law, reviewed de novo by the appellate courts without recognizing any district-court discretion. But most of these statements were made in boilerplate paragraphs announcing standards of review for whatever issues were before the court, commonly in cases in which summary judgment was granted. Only one circuit court opinion rejecting discretion to deny involved review of a denial of summary judgment; that was a Seventh Circuit case that involved an official-immunity defense, a matter in which the specific substantive concern to protect against the burdens of trial and discovery may well explain a duty to grant a properly supported motion.

The Subcommittee, after studying the question again, continues to recommend "should."

The first question was why not revert to "shall." Courts seem to be divided, at least in pronouncement, on the propriety of discretion to deny a properly supported motion. "Must" is clear. "Should" is clear. "Shall" — because it is not clear — will better support continued evolution in the case law.

It was noted that in bankruptcy practice motions for summary judgment often are filed on the eve of trial in a contested matter. The judge should be able to say the motion is too late to be considered. The rule should not impose a mandatory obligation to grant a motion in terms that will require hasty and ill-considered action or postponement of a trial that may present urgent needs for immediate action.

A Committee member expressed continuing confusion. "How can we think 'should' means the same as 'shall'"? The Kuperman memorandum and outside letters, however, show that courts have different views. The proposal adopts "should" "because we like it better." But this is confusing to the bar. The high rate of "no disposition" outcomes in the FJC study does not tell us whether, or how often, the failure to decide a summary-judgment motion reflects a judge's view that there is discretion to deny. We should not do anything that might encourage courts to refuse to grant a motion — as by simply not ruling on it — because they would prefer that the case settle. We should be clear about what we're doing, and clear in the ways in which we inform the bar.

This comment prompted the response that it shows why "shall" has been eliminated from the rules lexicon. It is ambiguous. It can mean "must," "should," or "may." Translations in the Style Project were chosen to reflect what the word had come to mean in practice. "Should" was selected to fit the cases recognizing discretion to deny, in part because those cases seemed right for many circumstances. Serious problems would arise if "shall" were restored to exist in unambiguous uniqueness among all the rules but with ambiguous meaning for this particular rule.

The effect of the 2007 change was discussed further. Rule 56(c) will say "should" at least until December 1, 2010; the cycle of rules amendments makes any earlier change impracticable. The current project is aimed at improving summary-judgment procedure and making it uniform across the country. It is not intended to change the standard as it is now established, including the 2007 clear recognition of discretion to deny. Discretion to deny, moreover, is established for very good reason. It would be folly to say that when summary judgment is appropriate on only part of a claim or defense the court "must" grant it. Perhaps it would be helpful, in Committee Note or in reporting to the Standing Committee and for publication, to offer examples of discretion to deny. Examples might include that the motion is too late; summary judgment is proper only as to a small part of a case; the facts and issues that must be tried so far overlap anything that might be resolved by summary judgment that granting summary judgment may prove costlier than denial; and so on.

It also might be appropriate to add an observation to the Committee Note that the procedural discretion to deny may be superseded by substantive principles. Official immunity is the familiar example. Both qualified and absolute immunities have been recognized to establish protection not merely against liability but also against the burdens of trial and even the burdens of pretrial. This substantive principle might easily develop to defeat discretion to deny summary judgment; the many cases that decide collateral-order appeals from denials do not hint at discretion to deny. Instead denial is reviewed as a matter of law.

Further support was expressed for "should." The draft Committee Note makes its use clear. It might help to provide additional examples; "we're following the law, not changing it." Another Committee member agreed, suggesting that recognition of discretion to deny is appropriate as to fact issues and law issues that might better be resolved after the assurance of full trial-level presentation of the facts. As to matters of law, one consequence may be increased use of Rule 12(c) motions to catch out legal inadequacies that now are caught by Rule 56 motions.

Still another member supported "should," but urged that the Committee Note should be expanded to note the prospect that substantive immunity principles may overcome discretion to deny. The point might be made in general terms: The general procedural discretion to deny may yield to substantive-law principles that are designed to protect against the burdens of further pretrial proceedings or trial. This may be true even when, as in the Seventh Circuit case, a defendant clearly is not entitled to summary judgment on one claim and the only question is whether summary judgment is warranted as to another claim.

Another member commented on reading the cases described in the Kuperman memorandum. The 1986 Supreme Court cases "look more like 'must'"; the 2007 Committee Note seems generous on the scope of discretion if we want to keep the law as it was up to 2007. We may change the law by trying to address all permutations. Perhaps it is better to delete all of the draft Committee Note that addresses discretion to deny, and to avoid any comments about qualifying the discretion when substantive principles supervene.

This suggestion was supported by a reminder that the Standing Committee prefers that notes be shorter rather than longer. Adding examples of discretion and possible limits may move too far from the simple advice that the discretion should be sparingly exercised.

Judge Baylson noted that the Subcommittee had struggled to choose the verb. The Committee Note begins by honoring the 1986 Supreme Court decisions and leaving continuing evolution of the summary-judgment standard to judicial decisions. "Shall" will not be accepted by the Standing Committee. "Should" seems better than "must."

The proponent of "shall" agreed that if it will not be "shall," then "should" is the best choice. But the Committee Note should be stripped down.

It was noted that no cases have yet been found that rely on or explore the 2007 change from "shall" to "should."

Further support for "should" was expressed by noting that Rules 50(a) and (b) say that judgment as a matter of law "may" be granted. It is common to deny judgment at the close of the case, choosing to submit it for jury decision to get a "bullet-proof judgment." The same option should be available for summary judgment. Going to trial and getting a trial judgment may in fact spare the parties a lot of time and expense.

On motion, "should" was approved, 9 votes yes and 3 votes no.

Discussion returned to the Committee Note. Support was expressed for retaining the draft discussion of discretion, adding a discussion of immunity. Immunity springs from substantive law, not Rule 56. There may be other substantive doctrines that also defeat discretion to deny summary judgment. It would help to recognize this in the Note.

A different view was that there should be some change in the statement that "[t]here is no change in the rule that a court has discretion to deny summary judgment even if it does not appear that there is a genuine issue." Even though the Seventh Circuit decision involved official immunity, the court did not expressly rely on that in stating there is not discretion to deny.

The suggestion that it would be better to delete the entire paragraph on discretion to deny was renewed. It was supported by a reminder that care always must be taken to ensure that a Committee Note does not contradict rule text, and does not become the occasion for expanding rule text.

This reminder led another participant to suggest that the draft Note "has way too much useful stuff in it." It is important to explain why the rule should be changed, and how it is changed. But much of the explanation can be in the report to the Standing Committee and the letter transmitting the proposal for public comment. The Committee Note should be "leaner and meaner." It is right to say that the proposed rule does not change the summary-judgment standard. It may not be wise to say anything more.

Another Committee member supported the suggestion to delete the entire paragraph on discretion to deny. "Should" may seem to signal an expansion of the discretion to deny. It is better to leave the discussion to the 2007 Committee Note, relying on the new Committee Note for the initial observation that the standard is not changed. Two other members agreed, although one of them expressed continuing concern that it would be useful to say something about official-immunity cases.

A slightly different view was that it would be wise to delete much of the draft paragraph on discretion to deny, but that it would be useful to retain the final two sentences that quote and then elaborate on the 2007 Committee Note.

A variation suggested simple revision of the first sentence of the paragraph on discretion. It would say there is no change in the decisions addressing the question whether there is discretion to deny.

Further support was expressed for deleting the entire paragraph. It clearly has bothered many people, who thought Rule 56 established a right to summary judgment on making the proper showing. Denial is serious business; in most circumstances it is not appealable, and is not reviewable after trial and final judgment. The Style revision painted us into a corner. It is better to avoid anything that might emphasize and eventually expand discretion to deny.

An effort to bring this discussion to a conclusion posed two alternatives: Delete the entire paragraph on discretion to deny, or retain the final two sentences describing and supplementing the 2007 Note — perhaps with an added bit on substantive principles that may defeat discretion. Support was voiced for each approach. Deletion of the entire paragraph was suggested because "'must' is just as wrong as 'should.' The less said about it the better. The Note should not try to express all the law." Deletion was further supported as clean. It avoids the inconsequence of simple repetition and the risk that any variation would be an inappropriate effort to amend the 2007 Committee Note.

It was agreed to delete the part of the paragraph before the final two sentences. A vote on retaining the final two sentences divided evenly, 6 yes and 6 no.

An effort to draft a revised incorporation of the 2007 Committee Note was urged. Many lawyers are concerned about "should." Saying nothing may lead some courts who prefer "must" to read "should" as "must." "You have to tell the bar again and again." And it was argued again that something should be said about official immunity as a substantive right to be protected against further process.

The last view expressed was that the 2007 Committee Note should stand on its own. It was written when "should" was written into the rule. It is unwise to embellish it now. Nor is it appropriate for the Committee Note on a procedural rule to express views about what substantive law is or may come to be. (This view was expressed again later in the discussion of partial summary judgment. The Committee Note should not be used to re-explain a rule provision that is not being changed. The issue can be identified in the Report to the Standing Committee to pave the way for the memorandum transmitting the proposal for public comment. If there is extensive comment suggesting that the Note should be expanded, it can be taken into account.)

Reasons for disposition (note 4): After the November 2007 Committee meeting the Subcommittee unraveled a fractured vote by preparing a draft saying that the court must state on the record the reasons for granting summary judgment and should state the reasons for denying it. After further deliberation the Subcommittee decided that it would be better to direct simply that the court should state on the record the reasons for granting or denying the motion. The Committee Note continues to distinguish grants by stating that it is particularly important to state the reasons for granting summary judgment and that the statement should be dispensed with only if the reasons are apparent both to the parties and to the appellate court. The only discussion agreed with this choice. At times a district judge will not sufficiently explain the reasons. But in some cases the reasons are painfully obvious; in those cases nothing would be gained by forcing a redundant statement. This version of Rule 56(a) was approved.

Order of subdivisions — time for motion, procedure (note 5): The draft structure sets the times for motion, response, and reply in subdivision (b), while the procedures are covered by subdivision (c). Some participants have believed that it is clearer to present the procedures first, locating the time provisions later in the rule. But the procedures in subdivision (c) tie closely to the succeeding subdivisions for cases in which a nonmovant shows that it cannot yet present facts to justify its opposition (d); the consequences of failure to respond or to respond properly (e); judgment independent of the motion (f); and partial grant of a motion (g). Pushing the time provisions to next-to-last is likely to be inconvenient for many readers.

Some support was suggested for relocating the timing provisions. One observation was that by placing the timing provisions first the structure will create confusion as to the nature of the reply governed by the time to reply — there is a risk that this will seem to address a reply brief, not the subdivision (c)(2)(C) reply to additional facts stated in a response.

There was no direct disposition of this question, but the proposed structure seemed to be accepted.

Order for different time (note 8): Subdivision (b) allows for different timing if "the court orders otherwise in a case." It was asked whether an order should be required if the parties stipulate to extended time. From the parties' perspective, there will be great anxiety as the rule-set time approaches if the court has not yet "so ruled" on the stipulation. It was noted, however, that in most cases courts routinely accept the stipulation by order, while in some cases the court has an interest in rejecting the stipulation in order to maintain control over the case's progress. It would be possible to write a rule that provides protection for the parties if there is no ruling either way by the time of the rule-set deadline. But was agreed that this complication is not necessary.

Motion, response, reply, brief (note 9): The structure of subdivision (c)(2) presents drafting challenges. It has been agreed that the motion should be made in three separate sets of papers: the motion itself, as a brief identification of each claim, defense, or part of each claim or defense as to which summary judgment is sought; a concise statement of material facts the movant asserts are not genuinely in dispute, with citations to supporting materials; and a brief. The response is two sets of papers: the first combines a fact-by-fact response to the motion, any challenges to the admissibility of evidence cited to support the motion, and any additional facts the nonmovant asserts to defeat summary judgment; and a brief. The reply likewise is two documents: a reply to any additional facts stated in the response, and a brief. These elements are clear on careful reading. But the rule may not provide sufficient guidance to the less-than-careful reader.

The first observation was that the response indeed is a different kind of thing because it combines into one document the responses with citations, arguments about admissibility, and additional facts with citations.

One modest drafting change would be to amend the caption of proposed (c)(2) to become "Motion and Statement of Facts; Response and Responsive Statement of Facts; Reply and Responsive Statement of Facts. The captions of paragraphs (A), (B), and (C) would be changed to mimic the relevant one-third of the subdivision caption. Then it would be possible to separate the response from the citation of record support and evidentiary challenges, and to do the same for the reply.

It was agreed that a reply brief can be helpful, and indeed may be the first thing the judge consults.

The next comment was that the rule should clearly identify what the movant needs to submit, what the nonmovant needs to submit, and what the movant needs to do by reply. The briefs should be clearly separated from the motion, response, and reply. Clarity is particularly important because adverse consequences can flow from failure to move in proper form, and the draft rule itself provides adverse consequences for failure to respond or reply in proper form.

Renewed support was offered for separating the motion from the statement of facts asserted to be beyond genuine dispute. But the language of the draft for the statement of facts seems unfortunate in calling for a "statement that states concisely * * *." It was agreed to change this to "a statement that ~~states~~ concisely identifies in separately numbered paragraphs * * *.

(Later discussion concluded that further changes should be made, working on a reorganized version of subdivision (c) prepared by Professor Gensler.)

Support for positions (note 13): Draft (c)(2)(D) reads "a statement or dispute of fact must be supported by * * * (ii) a showing that the materials cited to *dispute or* support the fact do not establish *a genuine dispute or* the absence of one * * *." This provision has not been much discussed. There is no question about showing that the materials cited to support a fact do not establish the absence of a genuine dispute. A nonmovant is not obliged to provide any record citations; it suffices to respond that the citations provided by the movant do not carry the burden of showing the absence of a genuine dispute. So too there is no question that a movant is free to argue that materials cited to dispute a fact do not establish a genuine dispute. The defendant, for example, might support a motion by pointing to the deposition statements of three disinterested witnesses that the light was green for the defendant. The plaintiff's response pointing to testimony by the same witnesses that the sky was cloudy does not, without more, contribute to showing a genuine issue as to the color of the light. But the defendant-movant's argument on this score is ordinarily included in a reply brief. When will it be appropriate for a party to include a "does not establish a genuine dispute" assertion in a motion, response, or reply? There are some possibilities. The most likely illustration may be that a so-called "additional fact" asserted in a response is irrelevant or is really an inadequate attempt to dispute a fact in the movant's statement. The movant might assert in a reply, for example, that the "additional fact" that the sky was cloudy is not an additional fact but an ineffectual attempt to dispute the showing that the light was green. It also may prove convenient to use the reply to challenge the effectiveness of a "self-serving, self-contradicting" affidavit. The defendant might support a motion by pointing to the plaintiff's deposition testimony that the light was green for the defendant; the plaintiff's response includes an affidavit that the light was red for the defendant. It seems a legitimate use of the reply to assert that the court should disregard the affidavit — as many courts have done — as something that does not establish a genuine dispute.

It was agreed that the draft should remain as proposed.

"No-evidence" motion (note 14): Draft subdivision (c)(2)(D) says that "a statement or dispute of fact must be supported by: * * * (ii) a showing * * * that an adverse party cannot produce admissible evidence to support the fact." This language is intended to cover the "Celotex no-evidence motion." This motion is made by a party who does not have the burden of production at trial, asserting that the nonmovant does not have sufficient evidence to carry the burden of production. It relies purposefully on "showing," a word taken from the Celotex opinion. This word does not say just how the movant makes the showing, a subject of continuing uncertainty in the courts and bar. This provision is included in the rule because it is an important aspect of the present summary-judgment standard, no matter how uncertain its scope may be.

The first observation was that this provision for a "no-evidence" motion is intended to be something quite different from the (c)(2)(B)(ii) direction that a response may include a statement that material cited to support a fact is not admissible in evidence. The response to a motion is quite different from a motion; it addresses material cited to support the motion's statement that a fact is not genuinely in dispute. There is some overlap — the motion itself may show that the trial burden cannot be carried if the movant has the trial burden on the fact and the admissibility rulings show that the movant cannot carry the trial burden.

Other issues were noted. As reflected in the Committee Note, the rule is intended to dispense with any need to make a motion to strike inadmissible evidence cited to support a motion for summary judgment. The cited "evidence," for example, might plainly be triple hearsay.

A separate question reflects longstanding drafting dilemmas. Many participants have found it awkward to speak of a "no-evidence" motion as one that includes a statement of facts that are not genuinely in dispute. Part of this reaction may stem from the common local-rule references to a statement of "undisputed" facts. The no-evidence motion does not say that the facts are undisputed in the sense that the movant and nonmovant agree. Instead it says that the nonmovant cannot generate a genuine dispute. What the motion looks like in practice will depend on how the court understands the "showing" referred to in the Celotex opinion. If the movant is allowed to say simply that the nonmovant must come forward in response with enough evidence to carry the trial burden of production on its claim or defense, there would be little guidance for the response. But draft (c)(2)(A)(ii) requires a statement of "those material facts that the movant asserts are not genuinely in dispute." (c)(2)(D)(ii) allows a showing that an adverse party cannot produce admissible evidence to support "the fact." The direction of the rule, then, is that the movant must identify specific material facts as to which the nonmovant has, but cannot carry, the trial burden of production. The only remaining ambiguity about the "showing" element of the Celotex opinion is whether the movant must do something more to demonstrate that the nonmovant cannot carry the burden or whether it suffices to identify the facts and challenge the nonmovant to carry the burden. Resolution of that ambiguity one way or the other would change the summary-judgment standard as it stands in some courts today.

For all the clarity of purpose, risks of misunderstanding may remain. Professor Gensler prepared a revision of subdivision (c) designed to express the same substance in ways that may be clearer on initial reading. The Committee agreed that this revision should be used as a guide to further reorganization, perhaps in directions that return closer to earlier drafts that were themselves reorganized to achieve the present rather succinct expression.

Specific phrases in the current draft were examined. (c)(2)(D) begins: "A statement or dispute of fact must be supported by * * *." What is a dispute of fact? Perhaps it would be better to say "A motion, response, or reply must be supported * * *."

(c)(2)(D)(1) refers to citations to materials without noting an admissibility requirement. Perhaps it should be "citations to particular parts of materials in the record that are admissible in evidence, including * * *." The difficulty with adding this reference, however, is that "affidavits or declarations" ordinarily are not admissible. "Depositions" may be admissible, but may not. It was agreed that admissibility should not be added.

The required citations are to "parts of materials in the record." It was asked whether this requires separate filing. The history of this version is clear. At the November 2007 meeting the Committee changed a portion of an earlier draft to read: "A party must ~~attach to~~ file with a motion * * *" cited materials not already on file. Then it was concluded that it suffices to require citation

to materials in the record — if they are not already in the record, they must be filed with the motion. A participant observed that Rule 56 should not be required to do all the work. Rule 5 describes filing, and includes a direction that most disclosures and discovery materials must not be filed until they are used in the proceeding. "Use" includes citation to support or oppose summary judgment. There is no need to encumber Rule 56 with overlapping directions.

Filing may not be enough. If the record is lengthy and the case complex, it may be important to assemble the materials in a way that makes them readily accessible to the court. At the November miniconference Judge Swain noted that some cases have lists of docket entries that by themselves may run for hundreds of pages; locating materials that in fact have been filed and are in the court record may be a difficult and time-consuming task. Throughout the development of Rule 56, Judge Fitzwater continually championed the use of appendixes of the cited materials and urged the legitimacy of local rules requiring appendixes. This question returned for further discussion later.

Noncomplying motions (note 18): Subdivision (e) addresses a response or reply that does not comply with Rule 56(c), as well as the failure to respond or reply at all. One set of questions addressed to this subdivision ask whether it also should include motions that fail to comply with Rule 56(c).

A version that would include noncomplying motions was included in a footnote for purposes of illustration. The inclusion does not much complicate the rule. It would begin "If a motion, response, or reply does not comply with Rule 56(c) * * *." The list of actions the court might take includes "(2) deny a noncomplying motion [with or without prejudice to renewal]."

Earlier discussions concluded that there is no need to address noncomplying motions. Courts regularly confront motions of all kinds that do not comply with procedural requirements, and have established ways of dealing with them. Summary-judgment motions can be handled as they have been; the need to address defective responses or replies arises primarily from the desire to establish and regulate a "deemed admit" practice.

The first suggestion was that the rule seems "unbalanced" if it does not address noncomplying motions. Noncomplying motions are denied; why not say so in the rule?

This theme was reiterated with a variation. Rule 56(c)(2) establishes the requirements for a motion. If a motion does not comply with the requirements there is no need to go further. But at the same time, it may be important to include noncomplying motions in the rule text as reassurance that the Rule 56 revision is neutral as between movants and nonmovants.

Support was expressed for leaving noncomplying motions out of the rule text, but adding some observations to the Committee Note. The observations might draw from the "one sentence" alternative suggested in the agenda footnote. The single sentence says that the rule text does not address defective Rule 56 motions because courts have general approaches to dealing with defective motions of all kinds, and because there may be a variety of defects that call for different responses. This single sentence might be elaborated by illustrating a variety of defects — making two documents where there should be three; failing to file cited materials not already on file; failure to cite to supporting materials clearly or at all; and compound or unclear statements of fact.

A more positive reason was then advanced for addressing noncomplying motions in the rule text. The rule text presses a nonmovant to make a very long response. It should be clear that the duty to respond can be avoided by attacking the motion for failure to comply with Rule 56(c)(2). Without this reassurance the nonmovant will fear the consequences of not filing a costly but timely response. An obvious alternative is to file a motion to strike the noncomplying motion, but these motions are not popular and courts seldom rule on them. This dilemma is compounded in courts that

rule that failure to move to strike waives objections — even to the point of ruling that failure to challenge the admissibility of materials offered to support a motion waives objections to admission at trial.

One response was that the court itself might be pleased to strike a motion that is too long.

A second observation was that the judge would like to have both the response and the argument that the motion does not comply; having both filed within the time to respond avoids delay. Another judge agreed.

It was noted that this dilemma is similar to the dilemma encountered when a nonmovant moves for time to conduct additional investigation or discovery. The draft Committee Note includes advice that a party seeking relief of this sort ordinarily should seek an order deferring the time to respond to the motion. This procedure supports the court's control over the timing question. But a good answer is hard to find.

It was asked whether experience under local point-counterpoint rules shows a need to add noncomplying motions to the rule text. The Committee has heard repeated complaints about motions that include massive statements of undisputed facts, accompanied by "boxes" of supporting materials. Do these courts have a practice of requiring that the motion be trimmed down before imposing the burden of response? An immediate reaction was that a nonmovant should not be allowed to respond by saying only that the movant states too many facts. The bloated statement may not be what the rule is intended to permit, but the Committee has properly abandoned any attempt to set a limit on the number of facts that can be advanced as not genuinely disputed. Complex cases may indeed turn on large numbers of facts. A lawyer then observed the experience that the judge focuses the parties on the issues before the motion is made. A motion to strike adds nothing to the response, even if the motion is far off the track. Another lawyer observed that focusing by the judge occurs in the actively managed case, the big case.

The final note was that the rule text should not include anything that will encourage motions to strike. The conclusion was that noncomplying motions will not be addressed in the rule.

"Deemed admitted" (notes 19, 20): Local rules adopting the point-counterpoint structure reflected in draft Rule 56(c) also include provisions that a fact is deemed admitted if there is no proper response. Successive drafts of what has become Rule 56(e) in the current version have gradually expanded the place for this practice, but some uncertainties have persisted. Ms. Kuperman has provided a research memorandum on the practice that illuminates some of the issues.

One issue was quickly resolved. Rule 56 drafts have moved away from directing that a response admit or deny a fact to directing that it dispute or accept a fact. A recent draft of the "deemed admit" provision spoke of acceptance, but further reflection suggested that it is more accurate to refer to a failure to respond, or to respond in proper form, as a failure to dispute. This change in (e)(2) was accepted: the court may "consider a fact ~~[as] accepted~~ undisputed for purposes of the motion."

Judge Kravitz noted that the Standing Committee discussion in January led to no clear conclusion. There was concern about considering a fact undisputed when the motion does not cite any support for it. One way to address this would be to add a few words: the court may "consider a fact supported by the record undisputed * * *." The cases do seem to support imposition of adverse consequences for failing to respond, or for responding in improper form. One alternative would be to consider undisputed "a properly supported fact." Inserting "properly," however, faces two obstacles. One is a simple matter of style — who would think that an improperly supported fact

should be considered undisputed? That objection need not be fatal; adding "properly" makes clear that the court must undertake some examination of the materials cited to support the fact. But the related objection is more important. "Proper" support is ambiguous. Does it mean that there are, as required, citations to the record? That the cited record materials do in some way support the fact? Or that the cited materials suffice on their own to carry the movant's summary-judgment burden, so that the failure to respond properly means only that the nonmovant has lost the opportunity for examination of other record facts that would defeat the movant's apparently sufficient showing?

The question can be framed as asking whether the trial judge is to be required to do the work that should have been done by the nonmovant in framing a response. Or — and no one has advocated that the judge must undertake an independent examination of all the materials that have been filed in the action, much less ask whether there are unfiled materials that might bear on the motion — should the judge be required to do some lesser part of the nonmovant's work? Or should there be unlimited discretion whether to do any part of the work, or instead to treat the absence of a proper response to a fact asserted by a movant as a default on that fact?

One part of the answer embraced by the draft is clear. It says that the court "may" consider the fact as undisputed. If it is changed to say that it may consider undisputed a fact supported by the record, then the court would have some obligation to consider the record. The extent of the examination, however, would remain uncertain: is apparent support enough, or must the court undertake a full-fledged, if one-sided, summary-judgment evaluation of the materials cited by the movant?

A further complication emerges from the drafting of (e)(3). It says that the court, faced with no response or a noncomplying response, may "grant summary judgment if the motion and supporting materials show that the movant is entitled to it." This language has carried forward from an earlier period when it was intended to say that the court must undertake a full examination of all the materials cited by the movant to determine whether, absent citation of contradicting materials, they satisfy the summary-judgment standard. It does not fit well with the later addition of the "considered undisputed" provision of (e)(2).

Whatever is made of the reference to record support, it must be clear from the rule text that considering a fact undisputed does not of itself establish a right to summary judgment. The court must still consider the facts established after weighing any proper part of the response and adding facts considered undisputed for want of a proper response, then set the outer limits of permissible fact inference on the basis of those direct facts, and finally determine the legal consequences of these direct and inferential facts.

This duty to determine the consequences of facts considered undisputed was supported as a clear, simple approach. The court does not grant summary judgment simply because some or all of the movant's asserted facts have not been properly disputed. And the court should be required to determine whether the materials cited by the movant at least support its position.

Further discussion emphasized the need to be clear in using the various terms that frame the discussion. Everyone accepts the proposition that the trial judge is not required to examine the record for materials that have not been cited by the parties, to ferret through the record or sniff about for buried truffles. Everyone agrees that failure to respond properly should not be treated as default of the entire action. There is some support for the view that the failure to respond as required by Rule 56(c)(2) should not relieve the court of the obligation to undertake a full summary-judgment examination of the materials cited by the movant. The "deemed admit" practice, however, rejects that view. The rejection could be more or less thorough-going. It might relieve the court of any

obligation even to look at the movant's cited materials. Or it might require the court to look at the materials to determine whether they "support" the fact in some measure — a plaintiff's self-serving deposition testimony that the defendant went through a red light does not entitle the plaintiff to judgment as a matter of law because the court or jury need not believe the plaintiff, but it does support the plaintiff's assertion that the light was red. The defendant could have established a genuine issue by doing no more than responding that the cited material does not establish the absence of a genuine dispute, see draft (c)(2)(D). But failing to do so allows the court to consider the fact undisputed if the court finds that appropriate. Looking at the cited materials for support would lead to a different result if the only material cited by the movant-plaintiff is deposition testimony that the light may have been red, it may have been green or yellow, "I don't know." That material does not support the plaintiff's position.

It was asked whether the rule text should attempt to address examination of the movant's cited materials. The rule says only that the court may consider a fact undisputed if there is no complying response. The court's decision will depend on a host of circumstances of the particular case. In most cases the first response is likely to be notice that the nonmovant has failed to respond as required and that failure to comply may lead to consideration of facts as undisputed. Why try to dictate further?

The problem of integrating (e)(2) with (e)(3) was addressed by suggesting that words should be added to (e)(3) to clarify the role of facts considered undisputed: The court may "grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it * * *." One question was whether this addition is unnecessary because "supporting materials" includes both materials cited by the movant and facts considered undisputed. An answer was that it is better to be explicit. The "may consider undisputed" in (e)(2) gives the judge discretion whether to treat a fact as undisputed because there is no proper response. (e)(3) then does different work by recognizing authority to grant summary judgment, but only if warranted by applying the law to the direct facts established according to the summary-judgment standard or considered undisputed under (e)(2), together with the facts that might be inferred on the basis most favorable to the nonmovant. All agreed to add "including the facts considered undisputed" to (e)(3).

A last suggestion was that the paragraphs of (e) should be reordered to set first the authority to grant summary judgment, then the authority to consider facts undisputed, and then authority to afford a second chance to respond or reply as required by Rule 56(c). This suggestion failed for want of support.

Action on the court's own (note 23): Draft Rule 56(f)(3) recognizes the court's authority, established under present decisions, to consider summary judgment on its own. The court must identify for the parties material facts that may not be genuinely in dispute. Discussion in the Standing Committee last January raised the question whether the procedure should be revised to one in which the court invites submission of one or more motions for summary judgment. The Subcommittee recognized that there is an advantage in inviting a motion because that will trigger the clear procedural framework of subdivision (c). This advantage is described in the draft Committee Note. At the same time, the Subcommittee concluded that the court may wish to move more directly. A common illustration arises when an individual public official moves for summary judgment on the basis of official immunity and the court rules that there was no constitutional or statutory violation. The official's municipal employer did not move for summary judgment because it cannot claim immunity. The court might well suggest that the parties should address the reasons why it should

not grant summary judgment for the employer on the basis of the determination that there was no violation at all.

The first question was whether the judge should be directed to identify for the parties material facts that may not be genuinely in dispute. Why not rely on the general obligation to give notice and a reasonable time to respond that applies to all independent actions by the court under subdivision (f)? The notice can identify the claims or issues, rather than specific facts, or, for another example, ask why summary judgment should not be granted for the employer in light of the ruling that the employee did not violate the plaintiff's rights.

One response was that if the court is not inviting a motion, the notice is at least similar to a notice to show cause. The parties need guidance as to what the court thinks important. Perhaps a sentence could be added to the Note observation about the invited-motion alternative, making it clear that the court can either identify facts for the parties or invite a motion. Unless the rule text is changed, however, any such statement would need to be consistent with the rule text on identifying facts.

A different approach was taken by asking whether the requirement of notice inherently demands identification of facts that may not be in genuine dispute, so there is no need for a redundant reminder in (f)(3).

A different question asked why there is any need for considering summary judgment on the court's own, when subdivision (f)(1) allows the court to grant summary judgment for a nonmovant. The answer is that the question may come to the court in a context independent of a motion for summary judgment. An important illustration is Rule 16(c)(2)(E), describing as one of the matters for consideration at any pretrial conference "determining the appropriateness and timing of summary adjudication under Rule 56."

This discussion concluded by leaving the way open for modest expansion of the Committee Note if that is not inconsistent with the more general goal of reducing the length of the Note.

Partial summary judgment (notes 1, 24, 25): The Committee has repeatedly considered the relationship between what have become subdivisions (a) on summary judgment in general and (g) on partial summary judgment. Discussion in the Standing Committee last January again drew attention to this question. It has been decided repeatedly that there is no need to refer to summary judgment "on the whole action" in subdivision (a). But it has seemed convenient to distinguish subdivision (g) by describing partial summary judgment as a device used when summary judgment is not entered on the whole action.

The first observation suggested that "partial summary judgment" is not a proper label. The motion may be for summary judgment on only a single claim or defense, or even part of a single claim or defense. The court may grant the motion in full without disposing of the whole action, or even disposing of a major part of the action. This observation was expanded. It is useful to adopt a well-recognized and much-used term. Courts and litigants continually refer to "partial summary judgment," even though the term does not now appear in Rule 56. As styled in 2007, Rule 56(d)'s caption refers to "case not fully adjudicated on the motion," and the text begins: "If summary judgment is not rendered on the whole action * * *." The present draft simply builds on the "whole action" term in the source. But it may be misleading for the reasons suggested. Perhaps it would be better to preface subdivision (g) like this: "If the court does not grant all the relief requested by a motion for summary judgment * * *."

The purpose of present subdivision (d) is to encourage orders specifying facts not in genuine dispute even when summary judgment is not appropriate as to all of a claim or defense. That purpose was expressed in the pre-2007 version by saying that "the court * * * shall if practicable ascertain what material facts exist without substantial controversy." Style Rule 56(d) eliminated the unfortunate suggestion of a "substantial controversy" standard different from the "genuine issue" standard of former and Style Rule 56(c), and reduced shall to "should, to the extent practicable * * *." Draft Rule 56(g)(2), freed from the constraints of the Style project, carries the notion of practicability one step further. It says simply that the court "may enter an order stating any material fact * * * that is not genuinely in dispute." This recognizes that summary disposition of individual facts may require great effort by the court without any substantial benefit to the parties at trial, and indeed with some risk that a trial limited by facts taken as established will be distorted.

The question of identifying "partial summary judgment" was carried further. Many situations arise. Summary judgment may be sought on all claims among all parties. But it may be sought only as to one party, even an intervenor. It may be sought as to only one claim. Granting all the relief requested by the motion is partial disposition of the case, but a full grant of the motion.

One suggestion was that the subdivision (g) caption should be changed to "partial grant of motion." As revised to "partial grant of summary judgment, and still later to "Partial Grant of Summary Judgment Motion," this motion carried.

Further discussion led to an interim rejection of the proposal to begin subdivision (g) as "If the court does not grant all the relief," and so on. "[N]ot granted on the whole action" was thought better because it covers the case in which the motion is completely granted but does not dispose of the entire case.

The long-abiding puzzle of the fit of the partial summary-judgment provision with the general summary-judgment provision was brought back for discussion. Subdivision (a) says that the court "should" grant a motion for summary judgment on a claim, defense, or part of a claim or defense. Subdivision (g) says that if summary judgment is not granted on the whole case, the court "should, if practicable, grant summary judgment on a claim, defense, or part of a claim or defense." Why are these not inconsistent, conflicting in the force of the direction to grant summary judgment?

The first response was that it may not be wise to enter summary judgment on part of a claim or defense. It is better to direct only that the court should do this if practicable. A claim should not be "sliced up into little pieces." But what, then, is the intended distinction between "should, if practicable" grant as to part of a claim or defense, and "may" state material facts not genuinely in dispute? This needs further thought.

Following informal discussions, the doubts about the relationship between subdivision (g)(1) and subdivision (a) prevailed. Subdivision (a) should be the only one that addresses summary judgment on all or part of a claim or defense. "Should grant" will prevail as the standard without any confusion about "should, if practicable" created by draft (g)(1). (g)(1) will be eliminated. The proper focus of subdivision (g) then becomes the discretionary authority to determine that a material fact is not genuinely in dispute. This authority is useful when the court does not grant all the relief requested by the motion. In effect, the relief requested by the motion determines what is "all or part of a claim or defense." To the extent that the court does not grant the motion request, it has discretion whether to determine individual material facts.

This integration is to be accomplished by changing the caption of subdivision (a) as noted earlier: "Motion for Summary Judgment or Partial Summary Judgment." That will be the only reference to partial summary judgment, implicitly identifying it as a motion that does not seek to

dispose of the entire action. Subdivision (g) will become a single subdivision without separate paragraphs:

> **(g) Partial Grant of Summary Judgment Motion.** If the court does not grant all the relief requested by a motion for summary judgment it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the action."

The Committee Note may be revised to say that the court can grant a motion in part. It might also express the Style convention that a reference to a motion on "all or part of a claim or defense" authorizes a motion as to all claims and defenses as to all parties. Again, much will depend on the determination as to overall Note length.

Appendix of supporting materials (note 33): The draft rule text, subdivision (c)(2)(D), requires that supporting material be in the record. It does not address the question whether the supporting materials might be gathered in an appendix. The Committee Note observes that the parties may find an appendix useful, or the court may order that the parties prepare one. The next sentence says that the appendix procedure can be established by local rule. This sentence has persisted in the Note in large part due to the repeated urgings of Judge Fitzwater. The Subcommittee has been uneasy about supporting local rules in light of the general ambivalence about local rules and a fear of encouraging a proliferation of rules on this subject. But it concluded that the sentence should remain in the Note.

A lawyer member said that lawyers will appreciate this sentence. "The more guidance on what the court wants, the better." A judge suggested that the sentence will not actually encourage courts to adopt local rules — they will, or not, as they wish. The Committee agreed to retain the sentence.

Judge Baylson moved that, subject to the discussion and the revisions agreed upon, the Committee approve transmission of Rule 56 to the Standing Committee with a recommendation that the proposal be published for comment. The revised draft will be circulated for review by the Advisory Committee on the understanding that there will be no need for a second vote of approval unless a Committee member asks for one.

The motion to recommend publication was approved, 12 yes and 0 no.

Judge Kravitz concluded the discussion by noting that work remains to be done on Rule 56, but the Subcommittee has done an enormous amount of work very well.

Expert Trial Witness Discovery and Disclosure

Introduction and background: Judge Campbell introduced the Discovery Subcommittee report on discovery and disclosure of expert trial witnesses. This will be the Committee's fourth discussion of these problems. The Subcommittee has worked to great effect in advancing the topic.

One set of issues arises from rather frequent disregard of Rule 26(a)(2)(B) limits on trial-expert disclosure reports. The rule requires a report only if the witness is retained or specially employed to provide expert testimony in the case or is a party's employee whose duties as an employee regularly involve giving expert testimony. A number of courts, however, reasoning that reports are a good thing, have required reports from employee experts who do not regularly give expert testimony.

A related set of issues affect treating physicians. It has proved difficult to draw a line that identifies the point at which a physician's testimony becomes that of an expert retained or specially employed to provide expert testimony. The difficulty may mean that a party who has relied on a treating physician to provide testimony on issues that go beyond treatment finds the testimony excluded for want of a Rule 26(a)(2)(B) report.

The American Bar Association has adopted recommendations on additional questions, urging that discovery be denied as to communications between an attorney and a trial-witness expert and also be denied as to drafts of the Rule 26(a)(2)(B) report. Discovery of these matters, however attractive it may seem in the abstract, has led to practices that impede the most desirable use of experts and at the same time defeat any effective discovery. Parties avoid creating draft reports; they limit attorney communications with trial-witness experts; they retain otherwise unnecessary sets of experts who function only as "consultants," not as trial witnesses; and indulge still other behaviors to ensure that nothing discoverable is created or preserved.

The Subcommittee recommendations address these problems in five parts.

The first part is an addition to Rule 26(a)(2)(A). For any identified expert who is not required to provide a report under Rule 26(a)(2)(B), the party's disclosure must state the subject matter on which the expert is expected to provide expert evidence, and a summary of the facts and opinions. An example of the summary might be: "the cause of the injury was the defendant's product." This disclosure will solve the problem of surprise and should eliminate the trend to require reports contrary to the rule.

The second part is a revision in the list of items required in a Rule 26(a)(2)(B) report. Item (ii) will be revised to read: "the facts or data ~~or other information~~ considered by the witness in forming [the opinions]." "Information" has been one impetus, along with the 1993 Committee Note, toward discovering "information" about the contents of attorney-expert communications and draft reports.

The third part is an addition of a new item (ii) to Rule 26(b)(4)(A): "Rules 26(b)(3)(A) and (B) protect drafts in any form of any disclosure or report required under Rule 26(a)(2)." This extends work-product protection to draft reports.

The fourth part similarly extends work-product protection to "communications in any form between an expert and retaining counsel." But there are three exceptions for communications that can be discovered in the ordinary course — those regarding compensation for the expert's study or testimony, identifying facts or data the expert considered in forming the opinions to be expressed, or identifying assumptions or conclusions suggested by the attorney and relied upon by the expert in forming the opinions.

The fifth part is the Committee Note.

At the Committee meeting last November there was general acceptance of the proposal to add party disclosure of testimony that is not subject to the report requirement, and also of the proposal to substitute "facts or data" for "data or other information" in Rule 26(a)(2)(B)(ii). The difficult questions have been draft reports and attorney-expert communications.

Costs and failures of present practice: Judge Campbell then presented a chart summarizing the reasons for believing that the proposed amendments will not defeat discovery of significant information that is discovered under present practice. At the same time, many untoward practices will be averted.

The first point is that those who oppose limiting discovery reject the view that the expert witness is properly part of a litigation team. But today's expert is an advocate, influenced by counsel. That will not change, whatever the discovery rules provide.

Adding work-product protection of draft reports and attorney-expert communications will rarely defeat discovery that actually occurs now. Discovery of draft reports occurs only if the attorney and expert are both so inexperienced as to create and preserve them, or in the rare case in which the court orders preservation. Attorneys and experts now go to great lengths to avoid having communications that might be discoverable, so again adding protection will not defeat much discovery that actually occurs now.

The proposals do not limit discovery of other information such as facts and data identified by the attorney and considered by the expert, work papers, and development of the expert's opinions. Further thought must be given, however, to discovery of the scope of the expert's assignment.

The advantages of the proposals are not the mere negative that they will not defeat much discovery that actually happens now. Present practice leads to little actual discovery because the rules lead parties and experts to avoid preparing draft reports, inefficient communications between attorney and expert, duplicate sets of consulting and trial experts, wasted deposition time devoted to generally fruitless efforts to discovery drafts and communications, and occasional fights about discovery of drafts. The proposals will not eliminate all of these costs, but should substantially reduce them. The use of duplicating sets of consulting experts, for example, is likely to be reduced but not likely to be eliminated.

Room remains to worry that the loss of discovery will lead to less restrained behavior by counsel in dealing with trial-witness experts, with unfortunate consequences. But New Jersey lawyers report that this has not been a problem under a rule similar to the proposals.

The proposals, in short, are designed to reduce litigation costs without losing useful information. Many years of continuing effort have not succeeded in significantly reducing discovery costs. Any progress that can be made is important.

Subcommittee members seconded these remarks. These discovery issues are "near and dear to practitioners." The proposals embody a real-world approach to what is happening. Expert witnesses "are not pristine; I do not pay $1,000 an hour for an expert to tell the court how good my opponent's case is." And there are many experts who are professional witnesses. Present practice, indeed, makes it difficult to hire many of the best experts. Even if they might be willing to endure the behavior required to reduce exposure to discovery, discovery of communications about how to be an expert witness makes it impossible to have the communications. And draft reports are not prepared; lawyers go to great lengths to avoid them. A lawyer may have two or even three sets of experts; the best of them may be assigned to the consultant role. Depositions focus on who the expert talked to, not the basis for the opinions. Such discovery generally is unnecessary; "I've never seen an expert survive cross-examination if the opinion is based on counsel's wishes, not sound expertise."

Another Subcommittee member noted that there was a high level of agreement among lawyers, both those who regularly represent plaintiffs and those who regularly represent defendants. The proposals will not only reduce costs but also enable lawyers to feel better about themselves by dispensing with the behaviors now used to deflect discovery.

A third Subcommittee member noted that the proposals will have "some cost in truth finding," and will generate some line-drawing problems. The savings, however, justify these costs.

Problems will remain with the use of experts in settings apart from trial, such as class certification or complex discovery disputes. But the process of developing the proposals has been good. The Subcommittee has dealt thoughtfully with all of the questions and challenges that were put to it.

Judge Kravitz noted that the Subcommittee has approached its work seriously, without an agenda to reach any predetermined result. He also noted that he had been able to discuss these topics with large groups of lawyers whose members include both plaintiffs' and defendants' representatives. They all want "something like this." But this common wish does not of itself justify action. All lawyers want to be free to "speak through their experts." Without more, the proposals might seem to impede truth-finding. Yet there may be little practical loss. We have been told repeatedly that efforts to discover attorney-expert communications and draft reports seldom find anything. And expert witnesses generally will be persuasive, or not persuasive, according to the strength of their opinions. Successful distortions by lawyer influence may be rare. And there may be great practical gain in avoiding the behaviors that are responsible for the general failure of discovery efforts.

Professor Marcus opened the detailed discussion of the proposals.

Party disclosure: The Rule 26(a)(2)(A) proposal for party disclosure of the substance of the opinions to be offered by an expert who is not obliged to give a Rule 26(a)(2)(B) report in one way carries back to the practice before 1993. From 1970 to 1993 a party could use interrogatories to learn the substance of the facts and opinions to be expressed by another party's expert witnesses, and a summary of the grounds for each opinion. The 1993 amendments substituted the more detailed report for experts covered by (a)(2)(B), but omitted any provision for other experts. The present proposal fills the gap, although it has been limited to a "summary" of the expected testimony without also requiring a statement of the "substance." Earlier drafts called for disclosing the substance of the opinions, but "summary" has been substituted in light of concerns expressed at the Standing Committee meeting last January. There is a real concern that treating physicians "may not be forthcoming on substance." The summary gives notice of what is coming. The witness can be deposed.

In response to a style question, it was noted that it is important to say "such" witness in the 26(a)(2)(A) disclosure provision because that limits the category to a witness who may present expert evidence at trial. Without this limit, the rule might seem to require a disclosure as to many witnesses saying that this witness will not provide evidence under Evidence Rules 702, 703, or 705 on any subject.

In response to an observer's question, it was noted that the disclosure covers the subject matter and summary of "expected" testimony because of a concern most readily identified with respect to treating physicians. Many lawyers report that it is difficult to get a treating physician to cooperate during the discovery process. Presumably the party will want to be in communication before calling the witness; the pre-1993 (b)(4)(A) interrogatory would have required such communication. The proposal is "a middle ground." The Committee Note underscores the need to identify these expert witnesses. In response to the observer's further question, it was stated that it will not be sufficient disclosure to say a physician will testify to "all aspects of treatment" if the party wants testimony on such matters as the prognosis for the next 20 years, the percent of disability, and the cost of future treatment. It also was suggested that a party acts at its own peril in attempting to set out a summary without having squared it with the witness.

The party disclosure proposal in Rule 26(a)(2)(A) was accepted without opposition.

"Facts or data": The New Jersey rule calls for discovery of "facts and data" disclosed by the attorney to the expert. It seems to work well — so well that there has been no case law developing its meaning. The present "facts or other information" and the 1993 Committee Note have supported discovery of attorney-expert communications and draft reports. Changing the term in Rule 26(a)(2)(B) is just a first step toward the 26(b)(4)(A) proposals.

It was asked then is a datum not a fact — why not just refer to facts? Several Committee members responded that "facts" emphasize matters unique, individual to the particular case. "Data" may seem to imply a larger, and perhaps anonymous, aggregation of facts.

This proposal was accepted without further discussion.

Draft reports: The first explanation was that after repeated discussions, it was decided that the protection for draft reports and attorney-expert communications should be provided in Rule 26(b)(4). Although the protection is defined by referring to the work-product protection of (b)(3), two reasons counsel locating the protection in (b)(4). (b)(4) is the general provision for expert discovery; it is where people will look first. And it is easier to work free from the "documents and tangible things" limit in (b)(3) by relying on (b)(4).

The work-product protection for draft reports relates also to the protection for attorney-expert communications — the drafts may be used as part of their communications. The protection extends to drafts "in any form," not only those in the form of a document or tangible thing. The protection includes drafts of the (a)(2)(A) disclosure as well as drafts of the (a)(2)(B) report. Although the door is closed on general discovery, discovery can be had on making the (b)(3)(A) showings of substantial need for the materials and inability to obtain the substantial equivalent without undue hardship. If discovery is allowed on this basis, the court still must protect mental impressions and the like as provided by (b)(3)(B).

The first question admitted to misreading what the draft intends. "drafts in any form of any disclosure or report" was not immediately connected to the intention to expand protection beyond reports in the form of documents or tangible things. It was agreed that an attempt will be made to redraft in an effort to avoid possible misinterpretation by others.

The important question remains whether to extend this protection to draft reports. It was agreed that protection is wise, but asked how will parties and courts draw the line between draft reports and work papers? The Subcommittee decided that work papers should be freely discoverable as essential elements in understanding the evolution — and hence the quality — of the expert's opinions. But the rule will invite experts to mark every paper as a draft report. Some things will readily fall outside the draft report category, no matter what label is attached. Calculations providing the foundation for the opinion are an example. So are the facts or data considered. But "he called me and told me to change it" will fall into the attorney-expert communication, not the draft report protection.

Attorney-expert communications: Proposed (b)(4)(A)(iii) extends work-product protection to all communications between an expert and retaining counsel, but then lists "bullet" exceptions that make three categories of communications freely discoverable. Different words are used to introduce the different categories to indicate different degrees of expansiveness.

The central question whether any protection should be provided for attorney-expert communications was quickly answered. All agreed that yes, protection should be provided.

Retaining Counsel. The first question asked why the limit on discovery addresses only communications between the expert and "retaining" counsel. How about house counsel who is also present? Or lawyers from other firms — perhaps those representing coparties? The draft Committee note urges a "realistic approach * * * in defining the contours of 'retaining' counsel." A sensible understanding of this term will include the range of counsel whose communications with the expert generate the kinds of discovery problems the Committee has been hearing about. "Counsel" alone seems too broad — we want the protection to be somehow tethered to this attorney and this case. Flexibility to accommodate a variety of situations is the goal. And it was difficult to find expanded rule text language that would be reasonably clear. Further suggestions were "the party's counsel," or "coparty counsel." But it was observed that the same attorney may retain the same expert for many cases: we need to protect against discovery of communications in earlier cases that involved a different party.

The possibility of framing a definition of "counsel" was briefly considered and rejected because of the pitfalls that seem to beset efforts to define rule terms. There are only a few definitions in the rules, and some of them have caused difficulty.

Another alternative was suggested: "between a party's expert and counsel." But that might encounter difficulty in the phenomenon that usually it is the attorney who retains the expert, albeit acting as the party's agent.

It was agreed that "the last thing we want is litigation over who is 'retaining' counsel." The Subcommittee will try one more time to see whether a suitable expansion or substitution can be found.

Communications about compensation. The first bullet provides for discovery of communications "regarding" "any" compensation for the expert's study or testimony. "Regarding" is used as broader than "identifying" in the next two bullets. Discovery into the scope of potential sources of bias should be broad. And discovery into other sources of information about compensation is not touched.

It was noted that "any" compensation is a potential trap — it seems more expansive than "the" compensation required to be disclosed in the (a)(2)(B) report. But it was intended to be broader, to reach such communications as "if you do well in this case, I have 15 more cases in which you can be retained." It was agreed that "any" is appropriate if the rule is intended to be this broad.

A Committee member observed that it is proper, at deposition or trial, to ask how much time did the expert spend? What is your hourly rate? Have you testified in other cases for this party? How much money have you made in all? And this remains freely discoverable under the proposed rule — indeed these questions do not even inquire into communications about these matters, only the facts.

A different question asked about the reference to compensation "for the expert's study or testimony." Suppose the expert is also providing consulting services: is that, if not testimony, "study"? If the expert says "I got paid for other things," is it proper to ask what the expert did? Does the exception open the door to that? "Study or testimony" was taken from (b)(2)(B), which requires that the report include "a statement of the compensation to be paid for the study and testimony in the case." The question was addressed by supposing an expert who is paid $50,000 for trial opinions and $950,000 for "consulting." The answer given by one committee member is that the $950,000 is discoverable. You can ask how much money have you earned from this client. Another member agreed that you lose some protection if you use one expert for both trial testimony and consulting. A third member described the combined-functions expert as moving in a gray area that does lose

some protection. A different response was that payment for "study" seems to address directly compensation for consulting in the case. And "compensation" covers the promise of retaining the expert in future cases.

Omission of "in the case," as compared to (b)(2)(B)(vi), was explained by concern to allow discovery of communications in past cases (here again the illustration about promises for future work) and those looking forward to future cases. These examples are covered as communications about "any" compensation.

It was noted that it is common to retain an expert for consultation and then, when the expert's views turn out to be favorable, to make the expert a testifying witness. Discovery should extend to the entire compensation paid for all work.

This discussion led to the question why there should be any limit to compensation for "study or testimony" — why not allow discovery of all communications about compensation? It was responded that it is proper to ask about the compensation, as suggested in the earlier discussion. If the expert has earned $5,000,000 from testifying in cases brought by this lawyer, discovery is useful. But why go beyond to inquire into communications about compensation in those other cases?

A different aspect of "study or testimony" was noted. Large firms engage in the business of providing expert testimony. One firm member may be the actual witness, with compensation figured separately for the witness, while many firm employees do the work that will support the testimony, with compensation figured separately for that work. Discovery properly extends to communications about compensation for all of that "study."

It was asked whether "compensation" is broad enough to clearly cover the agreement to pay $50,000 for this case coupled with a communication suggesting the possibility of earning $950,000 for testifying in 19 future cases. Should it be "compensation anticipated by the expert"? This suggestion was resisted as the likely source of much litigation. And the Committee Note is clear — discovery extends to communications "about additional benefits to the expert, such as further work in the event of a successful result in the present case * * *."

It was observed that a post-dated check should count as present compensation.

A different suggestion was "any compensation or benefits" for study or testimony.

Again it was noted that the protection and the exception address only communications between attorney and expert. The exception applies only to those aspects of a communication that the exception describes. Communications about other things the witness did are not communications about compensation. And questions about the compensation, not about communications, are proper.

The Subcommittee agreed to consider further the language of the compensation exception.

Communications about facts or data. The second bullet exception provides free discovery of communications between retaining counsel and an expert "identifying" "any" facts or data that counsel provided to the expert and that the expert "considered" "in forming" the opinions to be expressed.

"Identifying" facts or data is meant to be broad, but not as broad as "regarding" in the exception for communications regarding compensation. Communications transmitting facts or data should be discoverable; discovery of all subsequent communications about ("regarding") the facts or data, or even other parts of the communication that transmits the facts or data, could easily extend too far, to include to all communications about the opinions to be expressed.

In response to a question it was stated that facts or data "considered" here, as in 26(a)(2)(B)(ii), includes facts or data that the expert did not rely upon to support the opinions to be expressed. This word is used to prevent defeat of discovery by saying "I did not rely on it." The next question asked how can it be that an expert does not "consider" facts or data provided by counsel? Minor examples were noted — the facts or data may be provided in an e-mail attachment or letter the expert never opened, or opened but discarded without reading. More importantly, the expert may be functioning in two roles: some facts or data are supplied for the consulting function, and are not considered in performing the trial-witness function. In addition, a lawyer may furnish a great deal of irrelevant information to the expert, not knowing what is relevant: a deep stack of medical records may be provided to a neurologist, who as expert makes the first determination which records should be considered in forming an opinion.

"Considered" was further questioned by asking whether discovery should extend to communications of facts or data "in connection with" the opinions to be expressed. The response returned to the dual-capacity expert. One expert may both be providing trial testimony and helping to evaluate settlement, prepare for cross-examination, and the like. We do not want discovery of communications directed at these nontestifying functions. "In connection with" could be too broad. "Considered" is the word chosen in (a)(2)(B)(ii), and seems better here.

Continuing enthusiasm was expressed for "in connection with forming the opinions," and also continuing doubts. There is a clear contrast between "considered" and "relied upon" in the third exception addressing assumptions or conclusions the expert relied upon.

This discussion concluded by acquiescence in the conclusion that the choice between "considered" and "in connection with" is a matter of "wordsmithing" that can be left to the Subcommittee.

It also was noted that it is proper to ask why an expert did not consider something, whether fact, datum, or something else. All the proposed rule does is protect against discovery of attorney-expert communications regarding facts or data not considered by the expert in forming the opinions to be expressed.

The consequences of this exception were explored by asking what happens if the expert is asked at deposition about communications of facts or data. The expert gives a detailed answer, but omits a fact or two. The omitted facts are not critical, and may not have affected the opinion. Will this become a basis for excluding testimony at trial? The response was that so long as the facts are in the (a)(2)(B) report there is no basis for exclusion in Rule 37(c)(1).

Assumptions or conclusions. The third bullet exception allows free discovery of communications between an expert and retaining counsel "identifying" "any" "assumptions or conclusions" that counsel "suggested" to the expert and that the expert "relied upon" in forming the opinions to be expressed. Again, "identifying" was chosen over "regarding" for the same reasons as supported the exception for communications "identifying" facts or data. Both "assumptions" and "conclusions" are covered. As compared to facts-or-data communications, this exception addresses only assumptions or conclusions the expert relied upon; discovery as to those discussed but not relied upon would be too broad. And as with the other two exceptions, this one applies only to escaping the general work-product protection for attorney-expert communications. It does not speak to other discovery of assumptions or conclusions relied upon or not relied upon.

An observer commented that it is important to address both "assumptions" and "conclusions." A witness may be told to assume a fact — an assumption — but also may be told to

accept a conclusion. The expert might be directed to give an opinion of value that rises to at least $X, or to frame an opinion by assuming the accuracy of a conclusion provided by a different expert.

The first question was whether the exception should be broader than assumptions or conclusions "suggested." Several members suggested that "provided" to the expert would be better. This suggestion was accepted by the Subcommittee.

The next question built on an observation in the draft Committee Note that this exception does not extend to "more general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts." Why not? The generalized response was that extending discovery this far would inhibit lawyers from having freewheeling discussions that may be valuable in improving the ultimate opinions. An example might be: "Would it matter if the light was green? Why? Why not?" Yes, discovery of these discussions might be valuable. But these proposals are designed to address the practical consequences of expansive discovery: the discussions would not occur, and there would be nothing to discover.

Further discussion in the same vein agreed that it would be useful to discover the hypotheticals discussed by counsel and the expert. But the question is what cost is paid for the discovery. "You do not often get it under the present system. They manage not to create a discoverable trail." So the limit to assumptions or conclusions that the expert relied upon is justified.

For similar reasons, the exceptions should not be read to mean that "assumptions" are discoverable as facts or data, governed by the broader scope for things "considered" by the expert. If the expert is told it is a fact, then the communication is discoverable under the broader "considered" standard. But if the expert is told only to assume it to be a fact, the communication is discoverable only if the expert relied on it. The purpose is to protect communications about hypotheticals. As an example: Assume another expert will testify that the braking system was improperly designed. Your task is to testify whether the accident would have happened anyway.

Although this narrowing purpose is accepted, a line-drawing problem will remain. One way would be to delete the qualification added by "considered" to the facts-or-data communications exception, so that free discovery extends to communications "identifying any facts or data that counsel provided to the expert," period, end of sentence. The same argument would be made for dropping "in connection with" if that is substituted for "considered by." In response it was suggested that "assumption" is easier to identify than "facts or data."

The need to allow attorney-expert discussion of hypotheticals free from the fear of discovery returned to the discussion. Limiting discovery to "assumptions or conclusions that counsel suggested to the expert and that the expert relied upon in forming the opinions to be expressed" may not provide protection enough. It might open the door to discovery of all communications about the conclusions the expert will express — counsel might seem to "provide" the conclusion, whatever its origin, by discussing it without rejecting it. The need to allow discovery of such matters as the conclusions of another expert relied upon by this witness expert can be satisfied by allowing discovery only of "assumptions that counsel provided to the expert and that the expert relied upon." The expert has been told to assume the conclusion, making it an assumption for this purpose. "[C]onclusions" will be deleted from this exception.

This discussion concluded with a general observation that addressed all of the (b)(4)(A) proposals. Many lawyers have told the Subcommittee that they regularly stipulate out of the current discovery rules. Three attorney members of the Standing Committee volunteered examples of their standard stipulations at the meeting last January. Routine bargaining out of the system provides strong reason to doubt its worth.

Agreeing that the source of the assumptions relied upon by the expert should be discoverable, it was suggested that it would be better to delete "suggested" and extend the exception to discovery "identifying any assumptions or conclusions that counsel ~~suggested~~ provided to the expert * * *." The Subcommittee agreed to this change.

Scope of the assignment. The Subcommittee studied a possible fourth bullet exception that would provide free discovery of communications "defining the scope of the assignment counsel gave to the expert regarding the opinions to be expressed." Drafted in this form, the Subcommittee concluded that the exception would authorize open discovery of anything counsel said to the expert. Communications about the conclusions reached by the expert, alternatives considered, and so on might be discovered. And it was difficult to define an alternative exception that would allow important discovery while avoiding undesirable discovery.

The first question posed a hypothetical: Suppose the expert testifies to the market for automobile sales in the United States. Counsel for the other party then asks whether the expert considered the world market? And if not, why not? If the expert wants to say "I did not, although usually I do, because counsel told me not to," what do we do? Part of the response is that the question can be asked as framed, and can also be asked by inquiring into any assumptions counsel provided to the expert. These questions can fully explore the failure to examine the world market. There is little practical reason to be concerned about the prospect of an artificial response: "I always consider the world market, but I did not for this case." "Why not?" "I cannot tell you why not." That response would devastate the expert's credibility. The expert could answer instead "that was not part of my assignment." Failure to provide an exception to the protection of attorney-expert communications on this count only affects the way in which the questions are asked; it does not constrain the ways in which the expert chooses to respond. The lawyer will have to decide whether to limit the assignment in consultation with the expert about the vulnerability of an opinion based on a limited assignment.

Proposals accepted. Discussion of the proposed rule text closed with the conclusion that the Committee had accepted the substance of all the proposals and "ninety-nine percent of the wording." "This is terrific work." Only the draft Committee Note remains for discussion.

Committee Note. Like the Committee Note for Rule 56, the Note for the expert-witness discovery proposals should be examined to determine whether some parts of the valuable information it provides would be better used as part of the memorandum reporting the recommendation to the Standing Committee and transmitting the proposals for publication.

This question was put in a different way. The draft Note is excellent, but "too excellent." It would be helpful to transfer some of the explanation and justification to the report to the Standing Committee. On the other hand, it may be that some of the passages that look like "sales talk" also will provide a useful guide to ongoing practice, as a constant reminder of the realities of litigating behavior that prompted the amendments.

It was concluded that the Rule 56 and Rule 26 Committee Notes will be carefully examined so that the Standing Committee can be reassured that the Committee worked hard to strip out everything that can be deleted.

The draft Note cites a law review article that describes the cases that expand the expert-witness report disclosure in defiance of the rule text, and asks whether it would be better to cite some of the cases. Discussion of this question suggested that it is generally risky to cite cases as authority. Cases may be overruled, or superseded by growth in a different direction. It is less risky to cite cases not as authority but as illustrations of a problem, including cases that create a problem that should

be corrected. There is no risk that such cases will lose their value as note material if they are overruled — most especially if they are overruled by the rule amendment addressed in the Note.

An observer asked an unrelated question: did the Subcommittee consider dropping the requirement that a Rule 26(a)(2)(B) disclosure report must be signed by the expert? The party disclosure proposed for (a)(2)(A) is not signed by the expert. The Subcommittee recognizes that expert testimony commonly involves a collaboration between counsel and the witness. The Subcommittee responded that it had not considered omitting the signature. But the suggestion did not seem wise. The proposed amendments, as the prior rules, recognize the importance of cross-examining the expert on the positions taken by the expert. It is important to maintain the rule that this is the expert's report of the expert's testimony There is value in requiring that the expert at least read and reaffirm the report by signing it. Indeed some Subcommittee members initially resisted the idea of protecting attorney-expert communications, but became reconciled to the protection because it is, in the end, the expert's opinion and testimony. Signing the report is important to keep the expert "on the hook."

The final paragraph of the Note discusses the importance of extending to trial the work-product protection the proposals establish for discovery. This paragraph was included to reassure lawyers that they need not worry that the protection provided in discovery will be undone at trial. There is a risk that absent this reassurance lawyers will continue in all the artificial behaviors they have adopted to thwart discovery, at great cost and with some sacrifice of stronger expert testimony. But the Note offers advice on something that is outside the scope of the rules proposals. The proposals are deliberately confined to discovery. A rule governing trial may seem better suited to the Evidence Rules. There even is some risk that a "protection" at trial might be viewed as a matter of "privilege" for the statute, 28 U.S.C. § 2074(b), that requires that Congress approve any rule creating a privilege. In addition, this paragraph cites as "cf." a Supreme Court decision stating that work-product protection applies at trial of a criminal case. It seems peculiar to cite a decision that is no more than a "cf."; even a "see" citation may be a warning flag. And there is a risk in citing any case to establish a substantive proposition, given the possibility that the case might be overruled.

One approach would be to leave this paragraph in the Note for the time being, with a request that the Standing Committee consider the wisdom of sending it forward for publication.

Approval. Discussion of the expert-witness discovery proposals concluded with a motion that the Subcommittee be permitted to make changes in the rule text in accordance with the Committee discussion and votes; that the revised proposals be circulated to the Committee for information, but not for a vote unless a Committee member requests a vote; and that the revised proposals be submitted to the Standing Committee with a recommendation for publication. The motion was adopted, 12 yes and 0 no.

Time-Computation Project

Common concerns: Judge Kravitz introduced the Time-Computation Project by noting that concerns remain about integrating the effective date of the rules amendments with desirable statutory changes and with the need to allow local rules committees time to integrate local rules with the new time provisions. On the present track, the time-computation amendments will take effect December 1, 2009. The question is whether integration can be achieved by providing clear notice of each step from Standing Committee transmission to the Judicial Conference on through Supreme Court transmission to Congress. As to statutes, it has been hoped from the beginning that the several advisory committees will be able to create brief lists of noncontroversial statutory changes that can be recommended to Congress this year. Some communications from the Department of Justice

seemed to evince skepticism about the feasibility of enacting legislation on this schedule, but current developments in the committees suggest reasons for greater optimism.

Judge Rosenthal reported that she and John Rabiej had visited with staff of the House and Senate Judiciary Committees to discuss a variety of "advance-information" issues. The staffs thought there would be no difficulty in amending some statutes; indeed they were both sympathetic to anything that might alleviate the time-computation agonies suffered by practicing lawyers and optimistic about working on a schedule aiming for an effective date on December 1, 2009.

Judge Rosenthal further observed that the shorter the list of statutes to be amended, the better. The Bankruptcy Rules Committee has a list of 10 statutes, but all involve simply changing 5-day periods to 7. With advice from the Department of Justice, the Criminal Rules Committee has a list of 20 statutes, but 5 of them are on other committees' lists. It remains to be seen whether any of them are controversial.

As to local rules, the Administrative Office is working on a plan and timetable to see how many discrepancies there are between local rules and the new national rules. It will be desirable, if it is possible, to develop a transition plan to assist local rules committees and the bench and bar.

These preliminary observations concluded by noting that there were few comments on the published proposals. No one asked to testify. Subject to integration with statutory amendments and local rules, the project remains on track for adoption in the regular course. It is important that all advisory committees continue to work in harness toward this goal.

Discussion turned to identifying the statutes that might be nominated for amendment. Only one seems to require change. Proposed Rule 72(a) and (b) change from 10 days to 14 days the time to object to magistrate judge orders and recommendations. Because of the change to computing time by counting every day, the increase to 14 days is not an increase at all. Ten days always meant at least 14 days under the former method of computing that excluded intermediate Saturdays, Sundays, and legal holidays. The former computation method applied also to the 10-day period set by 28 U.S.C. § 636(b) for filing objections; the statute now means, and has meant all along, that "10" days means at least 14 days. It is imperative that statute and rule continue to operate in harmony. This statute will be recommended for amendment.

Professor Struve compiled a lengthy list of statutes containing time periods shorter than 11 days. Many of them apply to proceedings in civil actions. At least two of them seem strong candidates for revision, but the reasons for revision do not arise from the Time-Computation Project. 28 U.S.C. § 144 sets the time for filing an affidavit that a judge is biased or prejudiced at "not less than ten days before the beginning of the term at which the proceeding is to be heard." Section 138 directs that "[t]he district court shall not hold formal terms." There is an obvious problem in combining these two statutes, but the subject is sensitive and it may be better for the judiciary to stand back. The removal provisions of the Class Action Fairness Act include a notorious scrivener's error in 28 U.S.C. § 1453(c)(1), setting the time to apply for permission to appeal a remand order at "not less than 7 days." A bill already has been introduced to substitute the manifestly intended "not more than 7 days."

Apart from these statutes, it was decided that no others need be recommended for amendment. Some statutes involve matters of clear political concern, such as those limiting the duration of temporary restraining orders in labor disputes. More generally, Congressional adoption of short deadlines reflects concern that speedy action is required; rules committees are wise to defer to that judgment. Deference might counsel wholesale changes if it were thought that Congress intentionally relied on the Rule 6(a) computation methods in setting deadlines, but that seems

unlikely — indeed it is impossible for statutes such as the Norris-LaGuardia Act that were enacted before the Civil Rules came into being. A determination whether to recommend changes, moreover, would require clear understanding of the many different substantive areas involved in these statutes as well as an understanding of current practice and the realistic needs of practice. There is some reason to doubt whether the direction to compute statutory time periods according to Rule 6 is always remembered and relied upon in practice. One possible reflection is the Federal Deposit Insurance Corporation's comment on the published rules urging that there be no recommendation to change the statutory times relevant to its actions because it already employs the calendar-day approach.

The last problem common to all the sets of rules to be noted was a last-minute question about whether to include state holidays in computing backward-counting periods. The potential problem is easily illustrated. Proposed Rule 6(c) sets the time to file a motion at 14 days before the hearing. A motion set for hearing on a Friday ordinarily should be filed on Friday two weeks earlier. But suppose the Friday for filing is an obscure state holiday little known to lawyers in other states and perhaps eccentrically observed even within the holiday state. Because this is a backward-counting period, filing is due on Thursday, one day early. This could be a trap for the unwary. The Time-Computation Subcommittee struggled over a revised draft that would exclude state holidays only in computing forward-counted periods. In the end it decided that the resulting level of rule complexity would be more costly than the risk of inadvertently late filings. Even the most careful lawyers — and perhaps especially the most careful lawyers — are uncomfortable with complexity in computing time periods. There is little risk that a federal court would be persuaded to treat as untimely a filing caught up in an obscure state holiday; the Rule 6(b) authority to extend will be liberally exercised in this setting. It was noted that the Bankruptcy Rules Committee took no action to disagree, even though the Bankruptcy Rules do have a seemingly mandatory backward-counted period.

The Committee voted to approve the proposed Time-Computation "template" rule, conveniently published as Civil Rule 6(a), with the proviso that the chair can accede to any further changes recommended by the Time-Computation Subcommittee.

Civil-Rules specific concerns: Few concerns specific to the Civil Rules emerged during the comment period.

One comment asked whether the "count every hour" approach will countermand the Committee Note advice that breaks and adjournments should be omitted in applying Rule 30(d)(1), which presumptively limits a deposition to "1 day of 7 hours." The Committee concluded that there is no appreciable danger that Rule 30(d)(1) will be regarded as a "time period" requiring "computing" by this method.

Several comments raised a question about the change from 10 days to 30 days for filing post-judgment motions under Rules 50, 52, and 59. The change was proposed because the former 10-day period, always at least 14 days in practice, was simply too short for filing these motions in many complex cases. Courts have adopted responses to cope with the provision in Rule 6(b)(2) that prohibits extending these periods. One strategy, the simplest and safest, is to defer entry of judgment; the drawbacks are that the court has to be alert to the problem and may feel guilty about this method of subverting the direction that it cannot extend the period. A different strategy is to require timely filing of a skeleton motion, setting an extended time for briefing that will fill out the motion. The reasons for extending the time are strong.

The difficulty with the proposed 30-day period is that it coincides with the time to file the notice of appeal in most civil actions. Appeals may be filed on the same 30th day as one or more

post-judgment motions, requiring that the notice of appeal be suspended, only to revive upon the last disposition of any timely filed motion. Revival itself may be a trap because of the need to amend the notice or to file a separate notice if any party wishes to challenge the action taken on the post-judgment motion. The Appellate Rules Committee's Deadlines Subcommittee believes that it would be better to adopt a period somewhat shorter than 30 days.

Discussion began by renewing enthusiastic support for extending the period beyond 10 or 14 days. A deliberate choice was made in the Time-Computation Project to carry forward the Rule 6(b)(2) provision prohibiting extension of these time periods, fearing the dangers that inhere in attempting to add flexibility to periods related to the "mandatory and jurisdictional" time limits for filing a notice of appeal. Perhaps that question should be reconsidered. Revision of Rule 6(b)(2), however, requires more time than can be devoted in the context of the Time-Computation Project. In choosing a period shorter than 30 days, 21 days is only 7 days longer than was effectively allowed by the former 10-day period. That is not much of an improvement. 28 days would be better; although there are no 28-day periods in the time-amended rules, preserving 7-day increments is attractive. But if 28 days seems too perilously close to the 30-day appeal period, it may be better to fall back on 21 days. Adopting a mid-range compromise such as 25 days would set a period that appears nowhere else and does not have the advantage of fitting with the 7-day increment approach taken in setting common periods at 7, 14, and 21 days.

It was noted that the Department of Justice would always prefer to have more than 21 days, but that it could comply with a 21-day period, particularly if there is some opportunity to expand on the motion in the brief. The appeal period is 60 days in actions to which the United States is a party, but that does not seem to warrant setting different motion periods in Rules 50, 52, and 59 for those cases.

A lawyer Committee member observed that the bar would be grateful even for 21 days; that may be the best choice. A judge suggested that 28 days is better; it is not a big problem if a premature notice of appeal is filed. "Premature" notices, indeed, are a common experience. With CM/ECF, all parties are likely to have virtually immediate notice of all filings.

The need to integrate with the judgment of the Appellate Rules Committee led to resolution on these terms: The Rules 50, 52, and 59 periods will be set at 21 days. But the Appellate Rules Committee will be advised that the Civil Rules Committee would prefer 28 days if the Appellate Rules Committee believes that will not cause undue disruption. (The Appellate Rules Committee met two days later and agreed to the 28-day period.)

The Committee voted to recommend adoption of all of the other rules published for comment as part of the Time-Computation project, changing only from 30-day periods to 28-day periods in Rules 50, 52, and 59.

Rules Published for Comment in August 2007

Apart from the Time-Computation Project, other rule proposals published for comment in August 2007 included amendments of Rules 8(c), 13(f), 15(a), 48(c), and 81(d). A new Rule 62.1 also was published for comment.

Rule 8(c): The proposed amendment of Rule 8(c) would strike "discharge in bankruptcy" from the list of specifically identified affirmative defenses. Bankruptcy judges have been urging this amendment for several years on the ground that statutory changes make void any judgment on a discharged debt whether or not the discharged debtor pleads the discharge as a defense. Continued listing as an affirmative defense is inconsistent with the statutory scheme, and might mislead

someone to believe that the statutory protection is lost if the debtor fails to plead discharge as an affirmative defense. Comments by the Department of Justice have argued that the proposed change should not be adopted. The multiple arguments advanced by the Department have so far failed to persuade either the bankruptcy judges who have considered the arguments or the Reporter for the Bankruptcy Rules Committee. Nonetheless the arguments must be taken seriously, and should be considered with the continuing assistance of bankruptcy judges and the Bankruptcy Rules Committee. Discharge in bankruptcy has persisted in the Rule 8(c) list for many years after the relevant statutory changes without causing any apparent real-world problems. Little will be lost if action on this proposal is deferred one more year in the rulemaking cycle. At the same time there is a prospect that further discussions with Department lawyers may persuade the Department to support the proposal as published. The Committee voted to recommend adoption of the proposal, subject to deferring the recommendation if the Department continues its opposition in the Standing Committee.

The published Committee Note will be changed at least as follows: " * * * These consequences of a discharge cannot be waived; the Bankruptcy Code provisions governing the effect of a discharge are self-executing. ~~If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.~~" Additional changes may emerge from further discussions with the Department. One possible change would add this sentence: "This amendment does not address pleading by a claimant who believes that a claim is not barred by an adversary's discharge."

Rule 13(f): Rule 13(f) allows amendment of a pleading to add an omitted counterclaim. The published proposal deletes this subdivision. The standards for allowing amendment are expressed in words different from the general amendment standards in Rule 15, but are interpreted to mean the same thing. Apart from this source of potential confusion, courts have remained uncertain whether the relation-back provisions of Rule 15(c) apply to an amendment that adds a counterclaim. Deletion of Rule 13(f) will mean that all amendments are governed by Rule 15, including the relation-back provision. The only comment on the published proposal supported it. The Committee agreed to carry forward with the proposal.

Rule 15(a): Under present practice service of a responsive pleading terminates the right to amend a pleading once as a matter of course. Service of a responsive motion does not terminate this right to amend, which — so long as no responsive pleading is served — persists at least until the court rules on the motion, and perhaps beyond. The published proposal treats a responsive pleading and a motion under Rule 12(b) (e), or (f) in the same way: the right to amend once as a matter of course persists, but only for 21 days after service. Some of the few public comments urged that either a responsive pleading or a responsive motion should cut off this right to amend immediately on filing. The grounds for the comments were the same as those considered by the Advisory Committee and by the Standing Committee in several different meetings. The Committee agreed to carry forward with the proposal.

Rule 48(c): This proposal adds a new subdivision (c) on jury polling to Rule 48. The proposal is modeled on Criminal Rule 31(d), with variations to accommodate the differences between some aspects of criminal and civil procedure. There were no public comments. The Committee agreed to carry forward with this proposal.

Rule 81(d)(2): Rule 81(d)(2) has defined "state" as used in the Civil Rules to include, "where appropriate," the District of Columbia. The published proposal added to the District of Columbia "any United States commonwealth, territory[, or possession]." Among the comments was one by the Department of Justice renewing earlier-expressed concerns about including "possession" in this

definition. The Department has not been able to identify any entity that might qualify as a United States "possession," with the possible exception of American Samoa. It fears, however, that reference to a "possession" might be incorrectly interpreted to refer to military bases overseas. Control over these bases is allocated by agreements with foreign countries. The Committee agreed to acquiesce in the Department's recommendation that "or possession" be deleted. It further agreed to carry forward with the proposal as modified, and with conforming changes to the Committee Note.

Approval of Rule 81(d)(2) means that the conditional proposal to add a similar definition to Civil Rule 6(a)(6)(B), published as part of the Time-Computation project, will be withdrawn.

Rule 62.1: Proposed new Rule 62.1 responds to a suggestion by the Solicitor General several years ago. Most circuits have established a procedure for district court response to a motion to vacate a judgment under Rule 60(b) when a pending appeal defeats district-court jurisdiction to grant the motion. The court can defer action, deny the motion, or indicate that it would (or, in some circuits, might) grant the motion if the case is remanded. Many lawyers, however, are not familiar with this "indicative ruling" practice, and some newer district judges also are not aware of it. Proposed Rule 62.1 was refined over the course of several meetings. It was decided that it should be generalized to apply beyond the Rule 60(b) setting, so as to reach any situation in which the district court lacks authority to grant requested relief "because of an appeal that has been docketed and is pending." As the work progressed the Appellate Rules Committee concluded that it would be better to adopt an integrated Appellate Rule, published simultaneously as proposed new Appellate Rule 12.1, so that provisions addressed to action by the court of appeals would be found in the Appellate Rules rather than the Civil Rules.

There were few comments on this proposal. Further consideration of proposed Appellate Rule 12.1 suggests two minor changes in the Committee Note. Rule 12.1 and the accompanying Committee Note focus attention on the distinction between a limited remand that retains control of the appeal in the court of appeals and a remand of the entire action that dismisses the appeal. The Rule 62.1 Committee Note refers in two places to remand of the "action" or "case." These casual references will be changed to refer to remand for the purpose of acting on the motion in the district court.

The path of integration with Appellate Rule 12.1 has led to changes from earlier references to the appellate court to specific references to the "circuit clerk" and the "court of appeals." That means that the Rule does not address the rare but important circumstances of a direct appeal from a district court to the Supreme Court. Discussion of this result led to the conclusion that it is better not even to add a sentence to the Committee Note commenting that the courts will continue to evolve practice pending direct appeal to the Supreme Court as experience shows wise.

The Committee agreed to carry forward with proposed new Rule 62.1 with the changes in the Committee Note.

(After the meeting concluded it was noticed that the version of Rule 62.1 in the agenda materials did not conform in all details to the published version. The variations in the Committee Note are readily conformed to the Note as published. One variation in the published text of Rule 62.1(c) requires a change to conform to the version submitted to the Standing Committee at its June 2007 meeting: "**(c) Remand.** The district court may decide the motion if the court of appeals remands for ~~further proceedings~~ that purpose." Substitution of "that purpose" conforms subdivision (c) to subdivision (a)(3), which refers to the district court's indication of action "if the court of appeals remands for that purpose." It also is better because it clearly refers to a remand in response

to the motion and the district court's indicative statement. The more open-ended "remands for further proceedings" could be misread to include circumstances in which the court of appeals retains the appeal, decides on grounds that moot the motion but that require further proceedings for different reasons, and remands. This change was circulated to the Advisory Committee and accepted as the Committee's recommendation.)

Federal Judicial Center Study: Class-Action Fairness Act

Thomas Willging presented the current phase of the Federal Judicial Center Study of the impact of the Class Action Fairness Act on the number of class actions in federal diversity jurisdiction. He began by noting that long ago when the Judicial Conference supported legislation to use diversity jurisdiction as a means of moving class actions from state courts to federal courts, the Center predicted that the change would bring on the order of 300 additional class actions a year to federal courts. That prediction has proved remarkably accurate.

Figure 1 of the study presents the big picture. During the study period from July 2001 to the end of June 2007, the number of all class actions in federal courts increased by 72%, from 1350 to more than 2300. The largest increase came in "labor" cases, particularly opt-in classes under the Fair Labor Standards Act that are not governed by Civil Rule 23. (Occasionally state-law claims are added when there strong case law, at times in hopes of winning certification under Rule 23.) The next-largest increase was in "consumer protection and "fraud" classes, which are mostly federal-question cases although state-law claims are occasionally added. There is no reason to believe that CAFA affected the increase in these filings. "Contract" cases have increased at a fairly steady pace. The effects of CAFA have appeared primarily in contract actions, state-law consumer fraud actions, and to some degree in property-damage tort claims. The increase attributed to CAFA hovers in the range from 23 to 25 cases a month. This is remarkably close not only to the FJC prediction of 300 cases a year but also to the Congressional Budget Office prediction. The CBO prediction, however, was based on completely wrong foundations. They predicted 300 removals a year, and that all state-court class actions would be removed. They did not know how many class actions there are in state courts. The number is probably impossible to determine for all states, but good numbers are available at least for California; there are still thousands of class actions in California state courts.

Figure 2 shows original diversity filings and also removals. The increase begins immediately after the effective date of CAFA in February 2005.

Figure 3 shows that the origin of diversity cases has changed over time from the enactment of CAFA. Original filings began an upward trend that continues; removals went up, and now are declining. In response to a question, Mr. Willging recognized that the increase in original filings may reflect the choice of plaintiff class lawyers to file in federal court to have the advantage of picking which federal court they prefer, as compared to picking a state court they would prefer only to suffer removal to a less-desired federal court.

Figure 4 shows the percentage changes in original filings and removals on a circuit-by-circuit basis. It must be remembered that percentage changes may be more dramatic than the absolute numbers of cases. The dramatic percentage increase in filings shown for the Eastern District of New York in a later figure, for example, reflects a change from 1 case to 7. The increases are widely dispersed among the circuits; the greatest percentages are shown in courts in the Third, Ninth, and Eleventh Circuits.

Figure 7 shows that contract filings have increased greatly, from 14 a month to more than 30 a month. Consumer-protection actions have tripled, from 3 a month to 9 a month. These are seemingly low numbers that add up over time. The contract actions often involve warranty claims

or insurance practices. Hurricane Katrina may figure in the contract claims rates. Tort-property claims have risen from 3 a month to 5 a month. Tort-personal injury classes, apparently the source of the concerns that drove enactment of CAFA, have declined. The decline probably reflects the general disuse of class actions for these actions. The low absolute numbers must be understood, however, in relation to the counting method used for this study. If class actions are consolidated for MDL proceedings or are otherwise consolidated into a single proceeding, they were counted as a single action.

The next phase of the FJC study will look at two samples of pre-CAFA actions and post-CAFA actions. One pair of samples will involve an intense look at diversity cases; the other pair will look at federal-question cases, mostly to determine whether there has been an increase in the addition of state-law claims to federal-question classes. The plan is to report on at least the pre-CAFA diversity sample at the fall Advisory Committee meeting. Studying the post-CAFA sample may be delayed because it is important to study terminated cases, and many of the recently filed cases may not soon terminate.

It was noted that experience in California state courts may not reflect experience in all states. An intensive study of California filings is being conducted with the help of students from the Hastings College of the Law. Experience so far seems to show an 8% to 10% decline in California state-court filings. The FJC is helping a law student who has taken on a study of class-action activity in Michigan.

It also was observed that at least newspaper reports have indicated that the disfavor of "coupon settlements" shown by CAFA has affected state courts, leading to refusals to approve settlements and insistence on cash payments instead.

Judge Kravitz thanked the FJC for its work and resources devoted to the work. The study is very important for the Committee's continuing responsibilities to monitor class-action developments. The appearance of many new diversity class actions may have a significant impact on the way Rule 23 is used. It may be too early to begin an active Rule 23 project, but active attention remains important. The use of settlement classes has never been dismissed from the agenda, and one day may be a fit subject for possible rule revisions.

Administrative Office Forms

The Director of the Administrative Office has authority to prescribe procedures in clerk's offices. This authority is reflected in Civil Rule 79(a)(1), which directs the clerk to keep a civil docket in the form and manner prescribed by the Director with the approval of the Judicial Conference. Peter MCCabe noted that the Office has been drafting forms since the 1940s. The E-Government Act raised questions about privacy, prompting a review of the forms to determine whether any of them call for information that should not be gathered. The review process turned up 567 forms. A number of them raised questions under the Act and have been corrected.

The forms also have to be changed to keep pace with changes in the relevant bodies of rules. One illustration is Civil Rule 45. Rule 45 is printed on the back of subpoenas; when Rule 45 changes, the subpoena form must be changed.

The Office has asked Joseph Spaniol to restyle the forms used in courts. He has done 33 of what will be a total of approximately 100 forms.

The Civil Rules forms have been posted by the AO on its "outside" website, enabling people to fill them in for use. These forms have never been reviewed by the Advisory Committee. The AO is considering whether the process of generating and reviewing the forms should be changed.

Sealing Subcommittee

Judge Koeltl and Professor Marcus reported on the January 13 meeting of the Standing Committee Subcommittee on Sealing. The Subcommittee was initially created in response to questions about the practice in some courts that omits any reference to a sealed case from the court's docket. This problem has been addressed. But the practice of sealing whole cases remains for further consideration.

The question addressed at the Subcommittee meeting was to define the scope of its further work. Three possibilities were considered. The narrowest would be to look only at fully sealed cases. There are not many of them. The FJC study of sealed settlements worked on a sample of 227,000 cases; only 23 of them were sealed. A broader possibility would be to look generally at materials filed under seal. A still broader possibility would be to study other orders restricting the dissemination of information. The Civil Rules Committee considered some of these problems several years ago, in large part in response to proposals for "sunshine" legislation, and concluded after extensive work that there was no need for rules amendments at that time.

The Subcommittee decided to deal only with wholly sealed cases. That was the subject that led to creating the Subcommittee. This subject is difficult in itself. It will be necessary to find out just what cases are sealed. Indeed it will be necessary to define what should be treated as a "case" for purposes of the study — should the study extend to things like applications for search warrants or grand-jury reports? Going further to explore standards for sealing parts of cases, the proper use of discovery protective orders, and the like, would be a complicated and difficult undertaking.

The Federal Judicial Center will assist the Subcommittee by studying how many cases are being sealed, and why.

Sunshine in Litigation Act

Judge Rosenthal reported that legislation pending in the Senate would affect Rule 26(c) protective orders by requiring specific findings that the order does not affect the public health or safety, or that any effect on the public health or safety is outweighed by the need for privacy. If any protective order is justified, the court is required to limit it to the narrowest protection needed to protect the identified privacy interests. The same process must be repeated when the case ends to determine whether the protective order should survive.

The legislation addresses sealed settlements in similar terms.

The Advisory Committee has concluded there is no need for such legislation, drawing in part on a valuable study conducted by the Federal Judicial Center. There is no substantial ground to conclude that protective orders, or sealed settlements, deny the public knowledge of products, conditions, or persons that pose a risk to public health or safety. Absent any general need, the legislation is a bad idea. It would impose heavy burdens on the courts — indeed, given the proliferation of discovery materials as electronically stored information yields ever greater volumes of material, the burdens could become unmanageable. Apart from the burden on the court, discovery practice would be impeded. Parties unable to rely on protective orders would delay or impede discovery in many ways, both imaginative and confounding.

Similar legislation has been introduced in many Congresses. This time it has been reported out by the Senate Judiciary Committee and has bipartisan support. Careful communications with Congress on this topic will be important.

Future Work

Judge Kravitz raised the question of future Committee work. The Committee continually reminds itself that it may be appropriate to avoid a work schedule that brings revised rules every December 1. The bench and bar had to absorb the e-discovery rules in 2006 and the Style Rules in 2007. 2008 brings a respite, with only one technical conforming amendment of a Supplemental Rule. 2009 will bring the Time-Computation Project changes. On the present schedule, both summary judgment and expert witness discovery amendments will take effect in 2010. Perhaps 2011 will turn out to provide another respite from change. But urgent needs for change might emerge that require prompt action, or some minor amendments will seem achievable without causing any need for significant adjustments in practice. However that proves out, the process of generating, refining, and adopting rules changes seldom takes less than 3 years and often takes much longer. It is always important to pursue the Judicial Conference's § 331 duty to "carry on a continuous study of the operation and effect of the general rules of practice and procedure."

One item that will be on the agenda for the fall Committee meeting is last year's pleading decision in the Twombly case. Judge Kravitz noted that the Twombly decision was discussed at length by a distinguished panel at the Standing Committee meeting last January. The materials submitted for discussion by the panel have already been cited in a published opinion. The Standing Committee likely will want the Advisory Committee to examine many possible variations of amended pleading rules as experience develops under the influence of the Twombly opinion. The illustrative pleading Forms appended to the rules also will deserve reconsideration. It seems too early to begin serious drafting looking toward proposals to publish in 2009. But it is not too early to begin initial consideration of what possibilities might be explored. The Federal Judicial Center is thinking about possible ways to measure the frequency of motions on the pleadings and the frequency of granting the motions. As with all other topics on which they have done empirical research to support Civil Rules amendments, any help they can provide will be most welcome. A preliminary overview will be on the Advisory Committee agenda next fall.

Professor Gensler has suggested that the Committee investigate the advisability of adopting a national rule on privilege logs. Practice under Rule 26(b)(5)(A) is now governed in large part by local rules. That may not be a good thing. Loss of privilege for failure to comply with one local rule can easily mean loss of the privilege for all purposes. The national rule sends no message, or perhaps mixed messages, on questions like the time to provide the privilege log. It would be useful to learn whether practitioners find problems in this area. One Committee member observed that the subject at least deserves consideration. Privilege-log practice is intertwined with e-discovery, which has effected a sea change in dealing with privilege and privilege logs. Compiling privilege logs is the biggest expense in discovery today; it can easily run up to a million dollars in a complex case. A second member concurred — privilege logs are a source of huge expense, satellite litigation, and traps for the unwary. It was agreed that Professor Gensler will prepare a memorandum to support further inquiry.

It was further suggested that Professor Marcus should carry on his exploration of the ways in which the e-discovery amendments are working out with an eye to determining whether there are problems that need to be fixed. Professor Marcus pointed out that evaluating the development of e-discovery practice will be a difficult task. "Big bucks are involved." One widely quoted estimate is that annual revenues for consultants on e-discovery compliance will soon reach four billion

dollars. Privilege logs are an example. The rule has stood unchanged since 1993. Some vendors of e-discovery products say that it is easy to compile a log if only you buy their product. It is difficult to get reliable, dispassionate advice on e-discovery in general. It may be equally difficult if the focus is narrowed to privilege logs. "Looking hard may be a good thing, but it will be hard to do anything."

The perspective shifted a few degrees with the observation that it is a good idea to begin looking at these topics. But the "shifting sands" problem is always present. Evidence Rule 502 is at least well on the way to adoption by Congress. One impact may be that the resulting protection against inadvertent privilege waiver will increase the pressure to reply promptly to discovery requests, affecting the time to prepare a privilege log. Technology changes, whether in hard- or software, could change still further both practice and the problems of practice. There is no question that the time will come when it is important to look hard at all aspects of e-discovery. The first challenge will be to know when the time has come. It may be too soon now. Dissatisfactions are bound to arise now, but the need will be for a systematic inquiry. The "when" and "how" of the inquiry remain uncertain. It may be premature to designate a Subcommittee until the Committee has a good view of the landscape as a whole.

A Committee member agreed that the passage of time will be beneficial. The e-discovery rules have been good. Their intersection with things like privilege logs has had a material effect on the economics of law practice. Large firms now have "staff lawyers" or "contract lawyers" who work full time reviewing documents for privilege and responsiveness. The expense is substantial. It is an unusual dynamic.

Another Committee member noted that consulting firms are growing up. They offer services directly to general counsel, at a stated price per page. These consulting firms may take the place of staff lawyers or contract lawyers hired by law firms.

It was noted that the American College of Trial Lawyers is funding research into the actual cost of discovery. The project is just beginning, but it may provide information about the cost of privilege logs.

Thomas Willging noted that the Federal Judicial Center has "a pretty full workload," but might be able to assist a discovery project. The 1997 survey that supported earlier discovery amendments might provide a model.

These discovery topics will be considered further at the fall meeting.

On other topics, an observer noted that the American Bar Association Litigation Section is studying the desirability of working toward uniform pretrial orders. Some courts require a lot of make-work. The study may conclude that pretrial conferences should be held closer to trial, after rulings on summary-judgment motions. It was noted, however, that experience with Rule 16 amendments has shown a great deal of judicial sensitivity about pretrial practices. Many judges will resist changes that interfere with their preferred habits.

The suspended project on simplified procedure also was brought to mind. There is a continuing perception that many cases in the federal courts would be better governed by less searching and less expensive procedures. There is a related perception — for some a fear — that simplified procedures might bring to federal courts more federal-question claims for small damages. Experience with local "tracking" rules that have sought to assign some cases to more expeditious and less expensive procedures seemed discouraging when the simplified-procedure project was actively considered. Perhaps it would be useful to design a conference to consider the question

whether the Civil Rules have developed into a system that is "just right" for an intermediate range of cases, but too expensive and cumbersome both in the oft-discussed "large" "complex" cases and also in actions for potential recoveries that cannot support huge outlays on costly procedure. The Committee was reminded that RAND did a study of experience under the Civil Justice Reform Act. The "multiple tracks" approach was not recommended. Since then, litigation has grown more complex and costly. Judges have no desire to increase either cost or complexity. Much of the difficulty arises from the fact that many cases include at least one party that wants to promote obfuscation. Another Committee member noted that the source of much contention and cost is disclosure and discovery, "the fight over access to the underlying proof."

Next Meeting

The fall meeting likely will be held in Washington. If Rules 26 and 56 are published for comment, it seems likely that there will be requests to testify at the public hearings. It may be wise to schedule three hearings, with the expectation that two may suffice. The Committee meeting might be scheduled for November, giving enough time after August publication to enable some participants to prepare. November hearings, however, are too early for most organizations — the sources of many helpful comments — to prepare. A November hearing is most likely to be useful when the Committee wants an early sense of public reactions that will support preparation for the later hearings, including developing alternatives that might be discussed at the later hearings. The date will be set soon on consideration of all Committee members' calendars.

Adjournment

The Committee, having finished all agenda items, voted to adjourn.

Respectfully submitted

Edward H. Cooper
Reporter